

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHNSON & JOHNSON HEALTH CARE	.	
SYSTEMS INC.,	.	
	.	
Plaintiff,	.	Case No. 22-cv-02632
	.	
vs.	.	Newark, New Jersey
	.	October 30, 2023
SAVE ON SP, LLC,	.	
	.	
Defendant.	.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CATHY L. WALDOR
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings)

2

3 THE COURT: All right. It's October 30th at 1:25.
4 Make sure the mics are close to you. This is 22-22632
5 Johnson & Johnson versus SaveOn.

6 Let's have appearances, beginning with Johnson &
7 Johnson.

8 MR. GREENBAUM: Good afternoon, Your Honor.
9 Jeffrey J. Greenbaum, Sills Cummis & Gross. I'm here with my
10 colleague Katherine Lieb on behalf of plaintiffs.

11 I'll let Mr. Mangi introduce his group.

12 MR. MANGI: Good afternoon, Your Honor. Adeel
13 Mangi from Patterson Belknap Webb & Tyler.

14 I'm here with my colleagues Harry Sandick.

15 MR. SANDICK: Good afternoon.

16 MR. MANGI: -- George LoBiondo, Sara Arrow, Julia
17 Haigney-Long, and -- from Johnson & Johnson Health Care
18 Systems, Sheryn George.

19 THE COURT: Why are there only men at your table?

20 MR. MANGI: We've gone strictly in order of who's
21 handling the motions up first, Your Honor.

22 THE COURT: Okay. That assumes I'm letting you
23 argue your motions.

24 MR. MANGI: Yes, it does.

25 THE COURT: Yes, which -- go ahead. Let's go,

1 defense.

2 MR. WOHLFORTH: Good afternoon, Your Honor. I'm
3 Evans Wohlforth from the Robinson Cole firm. With me are
4 Andrew Dunlap, David Elsberg and Meredith Nelson from Selendy
5 Gay & Elsberg for the defense.

6 THE COURT: Thank you.

7 So let me start out by saying, Mr. Greenbaum and
8 Mr. Wohlforth have appeared before me on a number of
9 occasions, as some of you have. And I think they will tell
10 you that I am relatively patient human being. And, by the
11 way, they are quite skilled, and I always love when they come
12 into my courtroom.

13 So you owe me a compliment, both of you.

14 But outside of that, I spent the weekend reviewing
15 the papers. Obviously, I am not happy about it.

16 And Mr. Duva over here, in preparation of this
17 memo, spent many, many hours.

18 And I came in today after last night, thinking to
19 myself, well, here's what I'm going to do. I'm going to
20 leave the courtroom, and I'm going to let you have a real
21 face-to-face discussion about this -- because it's apparent
22 from these letters, folks, that you don't even talk. I don't
23 know what meet-and-confers you do.

24 But plaintiff says, we're already doing this.

25 Defendant said, no, you are not doing this. We did this

1 partially. We did this -- and you're just crossing each
2 other, which is exactly what happened the last time I had you
3 here.

4 And I heard you out last time, but I am not doing
5 it this time.

6 So my plan is this. Because Mr. Duva convinced me
7 to discuss a minimum amount of things with you, the easy
8 things. Then what you're going to do is have a face-to-face
9 discussion and iron out some of these issues -- because you
10 need to talk to each other. You're talking through me. I
11 don't want to be the "mommy" of the case. I want to be the
12 judge.

13 That being said -- sit down, Jeff. Have a seat.
14 Have a seat. Relax.

15 That being said, the first thing I want deal
16 with -- and it's not going to be in your -- you can't even
17 agree on an agenda, which is really funny, the order of the
18 agenda -- the first thing I want to deal with is -- Tim,
19 those twelve documents because that's freshest in my mind,
20 which is your Exhibit 1. Yeah. 149-1.

21 So let's discuss the purpose of uncovering -- or
22 opening up these exhibits, I assume, to show express and the
23 other one, the documents --

24 MR. GREENBAUM: May I make a preliminary comment on
25 what's before us?

1 THE COURT: On what?

2 MR. GREENBAUM: What's before us, because as a
3 member of the bar, I feel an obligation to apologize to the
4 Court for the hundreds of pages that have been reflected in
5 these papers. We have each side submitting 10, 12, 14 pages
6 a side, thousands of pages of exhibits, currently small
7 microscopic font size. And in all my years I've never seen
8 letters on joint letters of this length and -- overlength, in
9 my view.

10 And when we get, you know, 10, 12 pages, we have to
11 respond to them.

12 My solution and my suggestion is that in the
13 future, any joint letters be limited to five pages per side
14 with full-size fonts. I think that's in keeping with what's
15 been done in the past in other cases. And it would force the
16 parties to be clear and concise because I think it's an
17 impossible burden on the Court as well as the parties. We've
18 gone back and forth on some of these letters over a three-
19 or four-week period just to get -- well, you said this, and
20 we said this, and then we have to respond to you.

21 So I think that would be a solution, at least to
22 avoid some of the problems in the future.

23 THE COURT: That may be a partial solution.

24 So I want everybody to know that I had a very short
25 *ex parte* conversation with Mr. Greenbaum before the swearing

1 in on Friday where I indicated that I was not happy with him.
2 And I also had a short conversation with Evans,
3 Mr. Wohlforth, before you all came in the courtroom to tell
4 him my intentions and that I was as upset as I can be, which
5 is a very high bar because I don't get upset at much.

6 But it is kind of abusive when the Court has so
7 many cases, many more cases than all of you have, to have us
8 spend this much time reading these letters, as I said, that
9 you're clearly speaking through me, not to each other.

10 And if you had spoken to each other about a quarter
11 of a half of what's in these letters, we wouldn't be here
12 today. But I accept that.

13 And I also discussed with you that I'm thinking
14 about a special master in the case, and I don't know how
15 people feel about it. I don't know that I care. I don't
16 want to discuss it now. I'm in conference with the district
17 judge about that. I like the case. I love the lawyers. I
18 hate to do a special master and then impose that expense on
19 the parties. But it's getting to that point.

20 So that may be one solution. To limit the
21 submissions.

22 I'd also like to limit -- I mean, I've been known
23 to put on the docket, "There will be no further submissions
24 to this Court. Figure it out."

25 I'm way past that point here. But let's move on

1 today.

2 Let's start with the 12 pages.

3 Tell me -- the 12 documents. Tell me what the
4 problem with this is. Can it be redacted? Let's -- from a
5 practical standpoint. Go ahead.

6 MR. ELSBERG: Sorry, Your Honor. It's our
7 motion --

8 THE COURT: Yeah.

9 MR. ELSBERG: -- so just very briefly, as we
10 submitted to you in the papers and in the other motions as
11 well, one of the issues in the case is whether Johnson &
12 Johnson can identify people who take Janssen drugs who are
13 members of SaveOn pharmacy. It's a critical issue in the
14 case because if they can do that, yet they continue to pay
15 them, CarePath funds, that's a failure to mitigate. And it
16 can completely end a huge number of claims. Whether they can
17 identify those patients is absolutely critical.

18 And we have produced to Your Honor and the
19 documents at issue in this motion are benefit investigations
20 that Johnson & Johnson has conducted that show that yes,
21 indeed.

22 THE COURT: What do you want to do?

23 MR. ELSBERG: Well, we have served discovery
24 requests through a subpoena on ESI and Accredo. ESI is the
25 pharmacy benefit manager that works with SaveOn. Accredo is

1 the pharmacy that ESI owns. It dispenses a lot of these
2 drugs.

3 The benefits investigation we submitted to you show
4 that say right on the face of them that Johnson & Johnson or
5 its vendor called up ESI or called Accredo and ESI Accredo
6 said, yes, indeed, this patient is a member of the SaveOn
7 plan and yet Johnson & Johnson decided to continue paying
8 that person CarePath funds.

9 So we're trying to get both information from them
10 and information from ESI and Accredo. And we go to ESI, ESI
11 says, "Well, we'd like a little bit more information about
12 this. When do the requests come in? How do we provide it?
13 In what context?"

14 So what we want to do is take these documents,
15 these 12 documents, which we're glad to do on an AEO basis,
16 and show them to ESI's counsel so it can help them figure out
17 where the relevant material in ESI is located.

18 And we're doing this simply to gain the discovery
19 from ESI's side. But Johnson & Johnson has said, "No. We're
20 not going to let you show these documents to ESI."

21 We think this is a very reasonable request, a
22 straightforward request. It'll help us get the discovery we
23 need.

24 MR. GREENBAUM: Your Honor, we produced these
25 documents on the highest level of confidentiality, eyes of

1 counsel only. And something that the -- and they want to now
2 share it with not only their client but to third parties,
3 their partners and we say their co-conspirators in this case,
4 who are not even parties to this case. There's no reason to
5 do that. They don't need our documents to come back and tell
6 us what their documents say about us.

7 Your Honor, when I joined my firm, I had a partner
8 who complained to me about some search assignments that some
9 associates did. He was very smart, this partner. And he
10 knew some cases. And he would say, "Research this subject.
11 Here are two cases."

12 And what he got back was a memo discussing at great
13 length those two cases.

14 They don't need our documents to tell us what
15 communications they've had with us. They don't even need a
16 subpoena. They have -- this is their business partner. They
17 should comply with the subpoena.

18 And this request is done in the height of hypocrisy
19 in two respects. Number one, they claim that the issue they
20 need this for is mitigation. If you recall, we had a list of
21 all these patients, and we wanted to show "eyes of counsel
22 only" documents to our client so we could mitigate.

23 They said, "Oh, no." And Your Honor denied that
24 request.

25 Here, they want to not -- disclose it to their own

1 client; they want to disclose it to third parties without our
2 permission.

3 That's not permitted. We produced these documents
4 under the subpoena, under the DCO that gave us that
5 protection. And it shouldn't be going now outside of the
6 case, outside of the eyes of these counsels to third parties.

7 The second point of hypocrisy, which Your Honor may
8 not have the full background on, we served subpoenas on
9 Accredo and ESI more than six months ago. It would be last
10 January. And SaveOn fought, supported them tooth and nail in
11 fighting those subpoenas. They didn't serve their own
12 subpoena only until the end of discovery here, the
13 substantial completion date at the end of September. And we
14 think that was done for window-dressing. They didn't need a
15 subpoena to get documents from their own partners.

16 What happened with Accredo and ESI is they hired
17 the lawyer from -- we had meet-and-confers that went on for,
18 like, two or three months. And ultimately, they refused to
19 produce a single document. And we had to go and make
20 applications, not before Your Honor, who knows about this
21 case; they made us go to two different districts, and we had
22 to file papers in Missouri and Tennessee. And those
23 applications were fought by Accredo and ESI, and guess who
24 supported them? Mr. Dunlap filed an affidavit supporting
25 their application that they should produce no documents.

1 Well, they were ordered to produce documents, and
2 some of them are first dribbling in now.

3 This application, I think, is all to show they
4 don't need our documents. The DCO prohibits it, and it
5 shouldn't be permitted.

6 Thank you.

7 THE COURT: All right. Let me ask you, get down to
8 the more practical issue. Why is this designated attorney's
9 eyes only? What's so -- it's about insurance benefits;
10 right?

11 MR. GREENBAUM: Yes.

12 THE COURT: So explain to me what the
13 confidentiality of this is or why the documents can't be
14 appropriately redacted as a middle ground.

15 MR. GREENBAUM: Well, because it shows the format
16 and the inner workings of how these benefit investigations
17 are handled. It goes through patients. It goes to
18 discussions that were had. There's no need for the third
19 parties -- they haven't articulated any need for third
20 parties to see our documents to decide if they have
21 communications with us. And, in fact, these are not
22 communications between us and ESI. These are internal
23 documents. It's not like we're giving them an email to ESI
24 and then they have to look in their files to see if they have
25 an email back to us. I mean, they don't need that to find

1 | their documents. They should be able to comply and are
2 | required to comply with a subpoena.

3 | And the subpoena was served in September. And to
4 | our knowledge -- and we've been told that not a single
5 | document has been produced pursuant to the subpoena. So I
6 | think that just goes to add to the wholesale basis in this
7 | whole application and this whole claimed need for the
8 | subpoena. They don't need a subpoena to get documents from
9 | the cooperating parties, and they certainly don't need our
10 | confidential documents that do the same.

11 | THE COURT: I am not sure I understand -- okay.
12 | What you're saying is that there are descriptions of internal
13 | goings-on that may be subject to confidentiality.

14 | But I really don't see that.

15 | MR. GREENBAUM: Your Honor, this is our methodology
16 | of how we're trying to stop them from abusing our programs.
17 | And they -- this is, like, cat and mouse. If we show them
18 | how we got about approaching this, they'll just come up with
19 | more deception, as they've done all along. The documents are
20 | replete here, how they keep changing their tactics -- how
21 | SaveOn does -- to try to avoid detection.

22 | And if this shows -- Accredo and ESI, how we got
23 | about trying to find out if they belong to the SaveOn
24 | program, they'll just come up with new ways to try to defeat
25 | it. They can do their own searches without our documents.

1 And they don't need our documents to answer this subpoena
2 that's been issued. These are highly confidential documents,
3 eyes of counsel only, and they were produced on that basis.

4 THE COURT: So --

5 MR. ELSBERG: Your Honor, may I respond to a point
6 that he was --

7 THE COURT: Yes.

8 MR. ELSBERG: He said a few times that we want to
9 show these to our actual clients and we want to show these to
10 the business people at ESI and Accredo. That's not true. If
11 it's AEO, we're not fighting the AEO designation right now.
12 We're not going to show it to SaveOn's business people.

13 And all we want to do is show it to the counsel for
14 ESI and Accredo so they can use it as a guide for determining
15 where the relevant information is.

16 These documents are records of -- they're Johnson &
17 Johnson's records of discussions that they had with ESI and
18 Accredo where ESI and Accredo said, yes, this person is a
19 member of a plan advised by SaveOn. They have asked us,
20 "Well, can you give us information about the context in which
21 the discussions occurred, when they occurred," et cetera.
22 That's what these records will help show them. We're not
23 trying to use it for some business purpose here. We just
24 want to give it to the ESI and Accredo lawyers as a guide for
25 finding the relevant discovery.

1 All of these accusations that we're trying to use
2 it for some business purpose to try to evade detection is
3 absolutely -- is absolutely not true.

4 MR. GREENBAUM: And if we limit it to the lawyers
5 only --

6 THE COURT: Right.

7 MR. GREENBAUM: Your Honor can't even enforce that,
8 because they've avoided your jurisdiction. They made us go
9 out to Missouri. They made us go out to Tennessee just to
10 get responses to documents because under the federal rules,
11 you have to go to the home county of the place of
12 incorporation unless there's consent.

13 And we asked them for their consent to go before
14 Judge Waldor.

15 They said, "No, we're not doing that."

16 And they just made it more difficult and more
17 difficult. So we now have three proceedings going on
18 simultaneously to get documents.

19 THE COURT: So those subpoenas haven't been fully
20 litigated in those jurisdictions? Or they have?

21 MR. GREENBAUM: There have been orders requiring
22 compliance. There's one or two loose ends that are still
23 outstanding, and we're still trying to get documents pursuant
24 to those subpoenas and continuing to meet-and-confer. There
25 was a motion for reconsideration. Oh, it's too much. We

1 don't want to produce all this.

2 So that's still going on. We're trying to get
3 compliance with those subpoenas to enforce the orders of
4 those courts.

5 And this now is a new subpoena that was issued
6 until late September when all of this came up. And, in fact,
7 they wrote this application in September before they even
8 issued the subpoena. So the whole thing is really a put-up
9 job. And it's not necessary. And they shouldn't get our
10 internal processes in terms of trying to discover things that
11 SaveOn has been trying since day one to hide.

12 MR. ELSBERG: Your Honor. A few things on that.

13 First of all, in terms of when we brought this, we
14 brought it later in the period because they concealed from us
15 benefits investigations showing that they could identify
16 people in SaveOn plans until later in the period. In fact,
17 one of the letters they filed with you last week, they had to
18 concede that their prior representation to you that these
19 investigations has nothing to do with enforcing the terms and
20 conditions was false and, in fact, that they could and did
21 task their vendor with identifying members of SaveOn plans.
22 So they're trying to tag us with bringing this to you late
23 when it's their own withholding of the information -- is
24 really a little much.

25 Second of all, this is not about the motion that

1 they have brought to enforce a separate subpoena against ESI
2 and Accredo in another court. It's about what we're asking
3 you to do in this court. We're not asking you to just turn
4 over the documents to ESI or Accredo willy-nilly.

5 No, we will have -- we wouldn't turn them over
6 unless ESI and Accredo's lawyers signed the undertaking,
7 signed the confidentiality order and say that they are not
8 going to use it for any purpose outside the litigation.

9 This constant accusation that we're going to try to
10 use it for some business purpose is not true. We're asking
11 you for this because ESI and Accredo have said we need
12 guidance to help find the information that we need that will
13 show that we actually provided this information to Johnson &
14 Johnson on an ongoing basis.

15 They're fighting us pretty hard. That, you know,
16 the suggestion here, we think, is they know there's going to
17 be lot of information showing that on a lot of occasions they
18 could call up and get information from ESI and Accredo and
19 actually identify these members. And that shows lack of
20 mitigation. It's going to gut their claims. That's why they
21 don't want it to get turned over.

22 But we think we need this to get the discovery we
23 need.

24 THE COURT: Well, I am not concerned with the
25 accused motive on either side. So we don't need to talk

1 about that because that's pure conjecture.

2 What I want to know is if, in fact, their attorneys
3 sign on to attorneys' eyes only, why doesn't that protect
4 these documents?

5 MR. GREENBAUM: Well, sort of two reasons. Number
6 one, Your Honor, they are not members of this bar. We have a
7 lawyer in Boston who avoided consenting to Your Honor's
8 jurisdiction. That would have been the logical thing to do
9 when we wanted to enforce the subpoena.

10 Number two, we have lawyers in Missouri and
11 Tennessee who are also not members of this bar. And so
12 that's the shortest answer.

13 But, number two, we've [sic] not given any
14 compelling reason why they need our documents to see what
15 their investigations have had. If they've had communications
16 with us, they should go in their documents and find them.
17 We're talking about 12 instances. We've turned over -- and
18 in the last day, benefit investigation documents, and we've
19 agreed to do that. And we've agreed to do that. We're not
20 hiding anything.

21 We're going to give them to SaveOn.

22 But this is the question that SaveOn wants to get
23 information from its partners. Let them get that
24 information. They don't need our 12 instances. And if these
25 are the only 12 instances in the world, then I think they're

1 going to have a very slim case in trying to prove anything
2 from 12 instances.

3 But they shouldn't be able to see our internal
4 operations that are revealed in these documents. They don't
5 need it. They can do their own due diligence and look in
6 their files and make their production, which they haven't
7 done.

8 So this is, to me, a spurious application. There's
9 no merit to it. And it should be rejected.

10 THE COURT: Tell me again what you intend to do
11 with these documents, very specifically.

12 MR. ELSBERG: We want to show them to counsel for
13 ESI and Accredo. It's the same firm. We want to -- so that
14 they can see the information that was provided to Johnson &
15 Johnson. And this -- the benefits investigation, you've seen
16 them. They'll say, yes, we called up Accredo with ESI to
17 confirm that this was a member of SaveOn plan. They'll talk
18 about the date. There's other information there.

19 Counsel can then use that information to go try to
20 find in ESI and Accredo's files who would have communicated
21 this, when it would have happened, where that information may
22 be located.

23 THE COURT: Why does that matter?

24 MR. ELSBERG: Because we want the information. We
25 need to be able to find the information showing that they

1 communicated all this to Johnson & Johnson.

2 The more that we can show that they communicated to
3 Johnson & Johnson -- that ESI and Accredo communicated to
4 Johnson & Johnson, that members of CarePath were taking
5 Janssen were on SaveOn-advised plans, the worse it is for
6 them because it shows that they could have mitigated their
7 damages but they chose not to.

8 This is very important information, Your Honor.
9 This goes to a major issue in the case. And they are trying
10 to ham-string us from conducting an investigation with ESI
11 and Accredo. It's asking us for some help in finding the
12 relevant information.

13 There's no risk of disclosure here. They'll sign
14 the confidentiality order. They'll -- we will ask them to
15 submit for purposes of this order, to the jurisdiction of the
16 Court in case they stray outside. They can keep it on an
17 attorneys'-eyes-only basis. But they should -- Johnson &
18 Johnson should not be allowed to prevent us from conducting
19 reasonable investigation with ESI and Accredo on this basis.
20 There's nothing in here that's going to give away the game.
21 We just need to find out where the information is.

22 And the accusations they're making against us are
23 simply baseless. We just want to do discovery and find out
24 where the information is.

25 MR. GREENBAUM: Your Honor, this argument makes no

1 sense. We've given them the information. SaveOn is the one
2 that is going to produce -- make their arguments about
3 mitigation. They have these 12 instances. We've given them
4 that information on an "eyes of counsel only" basis. They
5 don't need to give it to ESI and Accredo. ESI and Accredo,
6 if they want to find other instances, let them find other
7 instances. Our 12 instances, which we already told them
8 about, are not going to help them find other once. It will
9 help them maybe find these. And if they have a procedure to
10 find any of these contacts, they should do it. They don't
11 need our documents to do it.

12 I mean, this is just -- there's just no logic in
13 what they're seeking here. And these are our confidential
14 documents. We produced them in good faith under the
15 protections of these orders. Your Honor previously denied us
16 the right to mitigate wholesale by allowing us to share with
17 our clients information to allow us to mitigate damages, the
18 exact same issue.

19 So we were denied that because they didn't consent.
20 And we're not consenting. These are our very sensitive
21 information. They don't need our documents. They know about
22 the 12 instances. They want to find more, let them ask their
23 partners to find more. They have a subpoena requiring them
24 to do so.

25 Since when does a subpoena require another party to

1 share their confidential documents? This is, like, my
2 partner's two cases. If we get back the 12 instances only
3 what does that accomplish?

4 MR. ELSBERG: Your Honor, I've got to say this
5 is -- we're really surprised at the level of the resistance
6 here. The whole argument about we don't want to -- we didn't
7 want to declassify our patient list so they could go forward
8 in the future and take people off of SaveOn. It has nothing
9 to do with what they've done in the past.

10 This is about historically, could they identify
11 people on SaveOn plans or not? Or not. And if they could
12 have but they kept people on, that's going to dispense a huge
13 number of their damages.

14 And what you heard Mr. Greenbaum said, I think, is
15 typical of a lot of things we hear from them -- and we do
16 meet and confer, which is trust us. We've given you what
17 there is. You don't need anything more, nothing more to --

18 But we don't think that's right. And we don't
19 think we should have to take their word for it.

20 And when we get to the letter we put in about a CAP
21 program, we'll hear from our colleague that we are concerned
22 that they haven't given us everything on benefits and --

23 THE COURT: That's not -- we'll get to that when we
24 get to it, but --

25 MR. ELSBERG: No, but I want to shoot down this

1 idea, Your Honor, if I may, that they've given us everything
2 and don't worry about it.

3 We don't know that they've given us everything --

4 THE COURT: Okay. That's fair.

5 MR. DUNLAP: And we need to find out what's going
6 on with ESI and Accredo.

7 THE COURT: But I still don't know what these
8 documents -- what further information these documents would
9 disclose to you or disclose to these two other -- how is this
10 a guide for information?

11 MR. GREENBAUM: Aren't we asking the wrong
12 question? Isn't it why do they need these? They've not
13 given any articulated reason that makes any sense as to why
14 they need our documents to respond to a subpoena which asks
15 them about their communications with us.

16 SaveOn already knows about these 12 instances.

17 How are these 12 instances going to help them with
18 any other documents? ESI and Accredo, both owned by Cigna,
19 the same company, can do their own search and respond to
20 their parent's inquiry and respond to the subpoena. They
21 don't need -- these 12 documents are not going to add
22 anything to it. This is typical of --

23 THE COURT: That's why I'm asking him.

24 What if you were to give certification as to the
25 people that were contacted with ESI -- from ESI and Accredo?

1 MR. GREENBAUM: The names of the people?

2 THE COURT: Yeah.

3 MR. GREENBAUM: Why do -- why would we be obligated
4 to do that?

5 THE COURT: You're not. I'm asking a question.

6 MR. GREENBAUM: I don't understand how --

7 THE COURT: Well, they say they want information
8 from the people from Accredo and ESI.

9 MR. GREENBAUM: Wouldn't the normal way to do that,
10 Judge, is that you would have a search done. You would go to
11 Accredo and ESI and say, tell us about communications with
12 J&J. All right? And they would go to the right people, and
13 that's exactly --

14 THE COURT: How do they know -- how do they know
15 the right people, though?

16 MR. GREENBAUM: Well, that's their business. They
17 have to do it for our subpoena. We've gotten court orders
18 requiring them to answer a whole list of document requests --
19 right? -- that deal with communications with us. And about
20 SaveOn. And they're required to do that. That's what's been
21 going on here. That's what each side has done. We've done
22 searches about SaveOn. We've done searches to respond. And
23 they've done the same. They talked about all the great
24 numbers of documents they produced. And that's how parties
25 operate. They make their own searches independent. We

1 | didn't go to them and say, "Tell us what you said to so we
2 | can then find our documents so we can respond to you."

3 | Each party has an independent obligation.

4 | And these now are third parties. They don't need
5 | our documents to fulfill their legal obligations.

6 | And this is typical of what's happening here. They
7 | make these broad overreaching requests in the hope that
8 | Your Honor will split the baby and give them something.

9 | Well, they are not entitled to this.

10 | MR. ELSBERG: Your Honor.

11 | THE COURT: What if you had the contacts, the names
12 | of people that were contacted with respect to these 12
13 | investigations?

14 | MR. ELSBERG: If they could tell us who at
15 | Johnson & Johnson spoke to whom at ESI and Accredo and the
16 | dates on which they spoke and the names of the patients that
17 | they spoke about, then we would definitely start with that.

18 | But they have refused to give us anything on this.
19 | Refused to give us anything on this anywhere close to that.
20 | If they want to --

21 | THE COURT: What's forthcoming --

22 | MR. ELSBERG: If they're worried about the
23 | individual documents but they'll give us the data that we
24 | need, we'll start with that.

25 | MR. MANGI: Your Honor, this -- I'm sorry. I

1 | didn't mean to interrupt.

2 | THE COURT: No. Go ahead.

3 | MR. MANGI: Okay. This goes to an issue about
4 | working with the client. So I'm just going to pop in to
5 | supplement what's been said so far.

6 | Your Honor, when we are asked to go and figure out
7 | who in the Johnson & Johnson family of companies was talking
8 | to someone; right? And remember that's 200-plus companies
9 | scattered around the world, of course, there's a way to do
10 | it. But it takes a lot of effort. We would go to
11 | Ms. George. She would find the right business units. We
12 | would talk to the right business people. They would help us
13 | identify, okay, who has responsibility for a particular
14 | subject matter. That's the process we go through. And we go
15 | through it in regular course of discovery.

16 | But ESI, which is one of the biggest companies in
17 | America, is certainly capable of doing exactly the same
18 | thing. They would go to their in-house counterpart. They
19 | would talk to the relevant business units. They would say,
20 | okay, you know, who's dealing with J&J? Who are your points
21 | of contact? They don't need us to go and do that work on our
22 | end just to save them from having to do that work on their
23 | end. This is their business partner. They're running this
24 | whole scheme together. So if they want to find who's talking
25 | to J&J within their outfit, whether it's SaveOn or SaveOn

1 plus ESI, they're fully capable of doing that. They just
2 need to talk to their business and say, "Who is talking to
3 J&J?"

4 The idea that for them to figure that out, they
5 have to start by us going and doing this deep investigation
6 about who's talking to them is completely backwards. If they
7 want to do that, go ahead and do that. That's part of
8 getting their case ready.

9 We're getting our case ready. But we don't have to
10 get their case ready.

11 MR. ELSBERG: Your Honor, since he stood up, I'd
12 like to respond, if I can. So the issue here is whether or
13 not there is information that SaveOn does not already have
14 that will allow us to show additional instances, more
15 instances, where J&J knew, they knew that a patient was a
16 SaveOn patient and yet they made the decision, the volitional
17 decision, the conscious decision to keep paying, for every
18 single patient like that, they get no damages.

19 The reason they got no damages is because there's
20 no causation. If they made the business decision to keep
21 paying, they caused the payment.

22 And even if Your Honor said, "Well, no, there is
23 causation," even though there's not, it's also a total
24 failure to mitigate.

25 So when we say this could put an end to or gut

1 | their case, it will gut their case on a patient-by-patient
2 | basis. And also when we show that not only did they identify
3 | SaveOn patients, but that they could, they knew where they
4 | could go to get this information about who are SaveOn
5 | patients and they decided we know how to do it but we're not
6 | going to do it, that will also show it was their choice, they
7 | caused any supposed damages, their damages, they say, are
8 | what they paid to SaveOn patients.

9 | And it will also show a total failure to mitigate.

10 | So against the arguments that they're making, I
11 | would suggest to the Court that the importance of these
12 | documents should be considered. They're saying that given 12
13 | documents -- I am not sure what they're saying -- is it a
14 | burden to give 12 documents? No.

15 | They say there's a confidentiality issue. But
16 | there's not.

17 | This will be attorneys' eyes only. So their
18 | arguments -- there's no burden argument. Their
19 | confidentiality argument is extraordinarily weak. You have
20 | lawyers, whatever bar they are, when a layer signs a
21 | protective order, the presumption is, unless there's a
22 | reason -- they are not going to risk their law license. So
23 | their arguments about what these -- this is 12 documents
24 | shouldn't be given are very, very weak arguments.

25 | And on top of that, Your Honor, on top of that,

1 | what we just heard is that here's another reason why these 12
2 | documents that are easy to get shouldn't be given.

3 | What we are hearing from counsel is they can do an
4 | enormously burdensome search, talk to all sorts of people.
5 | It's a very heavy lift. Well, that's irrelevant. That's not
6 | the question for today: How could they do it?

7 | The point is when counsel says that ESI can do it,
8 | they don't need their documents, that is an assertion that is
9 | simply not true.

10 | And how do we know it's not true? We know it's not
11 | true because ESI has specifically said, "We're having trouble
12 | do this. Please give us these documents."

13 | It's not that we said, "We have good idea -- we
14 | want to give this to you."

15 | They have said, "It will help us. It will help us
16 | find this information."

17 | And that information is very important because I
18 | don't think the other side is going to stipulate, if we say,
19 | look, we believe -- we believe that ESI -- there are 24
20 | people at ESI who told you, J&J, that 5,000 patients are
21 | SaveOn patients. And each of these 24 people not only told
22 | you, but they told you 30 times, each of them, over and over
23 | and over and over again. They're not going to stipulate to
24 | that.

25 | And we want to be able to show the jury -- we don't

1 want to say, "Listen. We think maybe we have all the
2 documents. We're not sure because ESI said, 'We need the
3 help.'"

4 We want to be able to, with the records, with the
5 documents, put those documents to J&J witnesses. We want to
6 be able to put that the witnesses from ESI and tell the jury
7 with specificity, here's what happened.

8 Now, J&J, trust us.

9 There is really no delta between what SaveOn
10 already knows and SaveOn can already get.

11 ESI has told us differently. And even if ESI had
12 not told us differently, what I would suggest to Your Honor
13 is that it is reasonable. It is a reasonable thing to
14 conclude that we will get additional information from ESI
15 that will help us find more patients that they knew about,
16 more people who told them about it.

17 And given the extraordinary importance of these
18 documents, even that should be enough because, again, the
19 three things they've said, if they look for it, it's a
20 burden.

21 Who cares?

22 That's not what we're talking about.

23 They said confidentiality.

24 Not a concern. There's a protective order.

25 And the last thing they say is their assertion,

1 | their empty assertion is we already know it.

2 | But ESI has told us, we can give you more
3 | information if you help.

4 | So, Your Honor, I would ask you to weigh whatever
5 | merit there might be to their arguments against how important
6 | this information is to us.

7 | And I won't go into the CAP documents. But it's
8 | the same issue. Their arguments to try to keep this from us
9 | and the Court are arguments to keep what are probably, if not
10 | the most important, among -- among the most important because
11 | they have no answer -- if you look at their letters on this,
12 | they have never said, "You know what, SaveOn? You're wrong."
13 | They've never say that if SaveOn can show, they identified --
14 | that J&J identified SaveOn patients, they have never said,
15 | "You're wrong. That's not going to gut our damages."
16 | They've never said that. Look at their CAP letter.

17 | They don't have an answer to that. And that's why
18 | these are crucial. We can show thousands of patients were
19 | ones they chose, they chose to pay, even though they could
20 | have pressed the button and said you're off. You don't get
21 | CarePath anymore.

22 | So it's hard -- it's just hard, Your Honor, to
23 | think of a document that's more important and their arguments
24 | to withhold these arguments should be very, very compelling.
25 | And they're just not, Your Honor. We need these documents to

1 have a fair opportunity to defend ourselves or they can say
2 they're not going to seek damages because they are not giving
3 us the evidence, and they are trying to stop us from getting
4 evidence that will help defend ourselves. There's no burden
5 on them. There's no confidentiality -- we're talking about
6 12 documents that go to counsel. Weighed on the other side
7 is what if we found another 100 instances where they knew and
8 paid patients. We shouldn't have to pay damages for those
9 patients. What if we find 100? What if we find just one?
10 They shouldn't get damages.

11 So we have the most important documents on one
12 side, and we have nonconcerns or slight concerns. We should
13 get the documents because we should be able to get this
14 information, Your Honor.

15 MR. GREENBAUM: Your Honor, excuse me for standing
16 up multiple times; I thought Mr. Elsborg was done.

17 THE COURT: That's fine wrap it up, though.

18 MR. GREENBAUM: The why these letters are so long
19 is because in any case, the application is whether it's going
20 to end the case.

21 We don't agree with their arguments that this is
22 going to establish the mitigation. If it were so easy to
23 establish mitigation, if we weren't required to -- if we had
24 to cut off these patients, why are they making such efforts
25 to hide the fact that SaveOn is involved in these patients?

1 We have been trying to find out. They fought us
2 tooth and nail in not allowing our clients to have the
3 information. So this is the -- the merits are not ripe here
4 for discussion.

5 They still have not established why giving them
6 information on these 12 instances helps ESI otherwise find
7 the information. If this is so important to SaveOn and to
8 their case, the business partner who's up to their eyes in
9 this conspiracy, which should put in the effort to find the
10 documents. They don't need our 12 instances, which SaveOn
11 already knows about, to find other instances. It's
12 illogical. It doesn't help at all to know that 12 instances,
13 which they already know, how is that going to help them find
14 other instances? We've given over documents on these benefit
15 investigations. There are going to be discussions about that
16 later on today. So that's not an issue. We are not hiding
17 anything.

18 But protective orders should mean something. When
19 we proceed in good faith to produce something on the eyes of
20 counsel only, we expect it to be honored and not shared with
21 third parties who are not even parties to this case and to
22 lawyers who are even in this jurisdiction and affirmative
23 fought to avoid Your Honor's jurisdiction.

24 So there's no logical connection as to why these
25 documents help them in any way. ESI has an obligation,

1 independent, to comply with our subpoena and to comply with
2 theirs. They're required to put in effort to do so. And
3 they should be required to do that. They don't need our help
4 in 12 instances, which SaveOn already knows about.

5 MR. ELSBERG: Since it's our motion, might I have a
6 very short reply?

7 So, Your Honor, I hope that Your Honor noticed
8 counsel referred to what I said about how everybody knows
9 that these documents are important because it will negate
10 causation, and it will negate and it will show they failed to
11 mitigate.

12 Counsel heard me talk about that. And what counsel
13 said was not an argument against that. He didn't say
14 causation would not be negated by these documents. We didn't
15 say this will not show a failure to mitigate.

16 He sort of changed the subject and said, "Well, if
17 it was easy to find these documents, then ESI would already
18 do it I am that the I am not exactly sure what he said, but I
19 know what he did not say. They don't have an argument
20 against these documents being crucial and case-killers.

21 And then -- I am not done -- and then --

22 MR. GREENBAUM: Excuse me.

23 MR. ELSBERG: -- the other thing that we heard is
24 what we heard before, which is they say, well, SaveOn has --
25 why does SaveOn need these? SaveOn knows the 12 instances.

1 SaveOn should go to their business partners and say, "Please
2 do this."

3 We did.

4 We did exactly what he said we should do. We went
5 to them. We said, "We want the information."

6 They said, "We need help."

7 So, again --

8 THE COURT: What do you mean "the information"? I
9 mean, aren't these communications between J&J and ESI and
10 Accredo?

11 MR. ELSBERG: Yes, Your Honor. There's the point.
12 There's the point.

13 There are records that they have, that they have,
14 Johnson & Johnson, that show what communications happened
15 that is right? And those documents ESI has said, "Give us
16 those documents because we don't have complete information on
17 that or it would be difficult for us to find."

18 The information on those documents that show who
19 was in contact with who, what was said, which patients were
20 mentioned, ESI has said, we don't -- it'll make it easier for
21 us to then go talk to the right people and find the right
22 documents. It will help, Your Honor. It will help. It will
23 help find documents that are absolutely critical.

24 THE COURT: Well, my decision is not based on what
25 it will help or whether or not it will help.

1 I think that they're relevant insofar as Accredo
2 and ESI. I also would say that they are protected if, in
3 fact -- I don't care what jurisdiction their attorneys are
4 in. Just because you're out of state doesn't mean you are
5 not going to abide by a protective order.

6 So I'm going to have these made available with
7 signature by attorneys for ESI and Accredo.

8 MR. ELSBERG: Thank Your Honor.

9 THE COURT: So let me talk to you about 162. I
10 refer you to my text order Number 127, which was pretty clear
11 in terms of the decision-makers I am not sure why we're still
12 arguing about this.

13 [As read] Plaintiff shall conduct a further
14 investigation regarding non-JJHCS personnel responsible for
15 making decisions regarding the CarePath program and shall
16 supplement interrogatory responses as appropriate.

17 MS. NELSON: Your Honor, I can address this one.

18 THE COURT: Okay.

19 MS. NELSON: Oh, I'm sorry I don't -- if I'm not
20 projecting well enough without the mic.

21 THE COURT: No. We need the mic.

22 MS. NELSON: Okay.

23 THE COURT: There's a couple of mics over there
24 too.

25 MS. NELSON: So I'll keep this very short.

1 THE COURT: Okay.

2 MS. NELSON: When we were here last time, you
3 recall, I'm sure in vivid detail, the fairly lengthy colloquy
4 we had about what we wanted. I think the parties disagree
5 about what Your Honor's meant.

6 THE COURT: Yes.

7 MS. NELSON: Of course Your Honor can tell us what
8 your order meant, but this is what we want today.

9 What we want is for J&J to answer the rogs that we
10 served, the language of the rogs we served, based upon
11 information in their possession, custody, and control. That
12 is a basic requirement of the federal rules.

13 And our problem with this decision-maker limitation
14 is that it leaves out relevant people; right? So if the four
15 people at this table sat in a room and talked about an issue
16 and tried to come to decision, I can tell you, Your Honor, if
17 someone were trying to figure out who the decision-maker is,
18 I certainly would not be on that list.

19 But I have relevant information. I sat in the
20 room. I had the conversation. I was part of the
21 decision-making process. I have relevant information.

22 And the rogs we served are very --

23 THE COURT: Or what you're saying is you don't
24 trust them to identify decision-makers?

25 MS. NELSON: No, our problem is that we want

1 everyone with relevant information. And we don't think that
2 just decision-makers necessarily captures all that. I don't
3 know what they mean by decision-makers; right? It could be,
4 you know, sitting in this room, maybe only you're the
5 decision-maker or maybe the lead counsel of each table and
6 you are a decision-maker. I just don't know what that means.

7 I just want the people who have relevant
8 information. If someone was sitting in a conversation or
9 someone at J&J was talking about, wait, should we change our
10 terms and conditions to say this, they have relevant
11 information that goes to the interpretation of those terms
12 and conditions. We just want their names. Like, this is --
13 this really is very basic stuff. These are basic rogs that
14 you serve at the beginning of discovery, and the parties are
15 obligated to answer them fully to give people with relevant
16 information that they can identify, based on what's in their
17 possession, custody, and control.

18 So I'll leave it there. I don't want to rehash the
19 whole conversation. But we think that -- we still don't have
20 a complete list of relevant people. And, frankly, we still
21 don't think they've searched in the right places. But this
22 goes, I think, in the first instance to the interpretation of
23 your order and what we want. We just want answers to our
24 rogs.

25 MS. HAIGNEY-LONG: Good afternoon, Your Honor.

1 Julia long for plaintiff.

2 I want to be clear about what counsel is saying.
3 What I heard is that they did not like the limitation in the
4 order that Your Honor issued. To be very clear and to return
5 to the order at question, your June 29th order directed JJHCS
6 to, quote, "conduct a further investigation regarding
7 non-JJHCS personnel responsible for making decisions
8 regarding the CarePath program and to supplement
9 interrogatory responses as appropriate."

10 That was a June 29th order. It is now
11 October 30th. The time for reconsideration of that order and
12 reconsideration of the scope of that order has long passed.

13 We complied with Your Honor's order immediately
14 after the conference. We began our investigation. At that
15 point, or shortly thereafter on July 5th, we received a
16 letter from opposing counsel with an extreme ask of who we
17 should do. They said -- and I quote just for a few
18 examples -- that any reasonable investigation must include
19 speaking with all members of the Janssen Americas Leadership
20 Team and their support staffs, including communications
21 teams.

22 That's 20 of the top leaders across the J&J family
23 of companies. The vast majority have nothing to do with the
24 CarePath program. The person who is responsible for
25 decision-making in South America is not relevant to this

1 case, and there's reason for us to speak with them.

2 They also demanded that we speak with Janssen Drug
3 random employees with a laundry list -- vice presidents,
4 senior directors, directors, senior managers, managers for
5 products, market access, sales, and national accounts for
6 Janssen drugs at issue in this case for each of the Janssen
7 drugs.

8 That is about 130 additional people. Again, not
9 relevant to this action and certainly not encompassed in what
10 Your Honor directed us to do.

11 At the June conference, we had different opinions.
12 We said, as has been our position, that JJHCS is the relevant
13 entity. It is the entity that makes decisions about the
14 CarePath program.

15 Counsel for SaveOn had different view.

16 Your Honor directed us to go back and answer the
17 interrogatories as to the non-JJHCS personnel.

18 That's what we did. And we supplemented our
19 interrogatory responses, to be clear, to add six additional
20 personnel, one of which was a JJHCS employee. The other five
21 worked for other Janssen entities. We've now disclosed that
22 to opposing counsel. And, really, there's nothing else for
23 us to do here.

24 THE COURT: That's correct.

25 So I believe my order's clear as to

1 decision-makers.

2 And what your interpretation of a decision-maker
3 and their interpretation of a decision-maker is, I am not
4 getting into the weeds with that. They've given you the
5 information on who they propose as decision-makers on
6 CarePath. And that will be that.

7 Go ahead.

8 MS. NELSON: Your Honor, can I put one thing on the
9 record very quickly. Right.

10 THE COURT: Yeah, sure.

11 MS. NELSON: So when we're talking about JALT and
12 the brands, the JALT, Janssen Americas Leadership Team --
13 right? -- we did not ask in our letter to go speak with 20
14 senior executives of the JALT. We asked them to
15 investigate -- right? -- because they had said to us over and
16 over again, there's only one person on the JALT with relevant
17 information. In fact, they won't actually say that. They'll
18 say there's one person on the JALT who was a decision-maker.

19 But we know, based on documents, that there were
20 other people on the JALT with relevant information. So the
21 reason --

22 THE COURT: How do you know? And what is that
23 information? Have you discussed that with your adversary?

24 MS. NELSON: Yes, and we've had these discussions.
25 It's in emails. They received emails about --

1 THE COURT: Is that how you're meeting and
2 conferring? By emails?

3 MS. NELSON: No, we've had phone conversations as
4 well, Your Honor.

5 THE COURT: That's going to stop.

6 MS. NELSON: Okay.

7 THE COURT: Your meet-and-confers are going to be
8 in court.

9 Go ahead.

10 MS. NELSON: I just want to make this clear that
11 when we ask them to look at the JALT and we ask them to look
12 at the brands, it is because we know, based on seeing
13 discovery and, frankly, what we know from our client, from
14 other -- from conversations that those are the people who are
15 making decisions about CarePath. They have budget
16 responsibility for CarePath. They decide how much money J&J
17 is going to pay out. That's where CarePath gets its money;
18 right? So there is a reason that we have concerns about the
19 answers they gave and we don't think they're complete.

20 But I understand, of course, Your Honor's ruling.
21 And I just wanted to make this record very clear.

22 THE COURT: Okay.

23 Did you want to respond quickly? No.

24 MS. HAIGNEY-LONG: No, Your Honor.

25 THE COURT: I like that "quit while you're ahead"

1 head shake.

2 Yeah, this leads me really to -- last time we were
3 here, I asked you -- we're talking about T&Cs now -- to
4 modify your ask, to review and modify so that you weren't
5 asking for everything in the world.

6 You did not do that. There was no modification.
7 There is no change in your asks.

8 I mean, it seems to me from this letter, you want
9 everything and anything that whispers. And that's not
10 proportional to this case or any case, number one.

11 Number two, if, in fact, you were to modify and
12 limit the scope of your requests and we found as a result of
13 that information was disclosed that very specifically you
14 could come to me and show me and say, "Wait a minute. Look
15 what we found. We're going to X now or Y now," you have
16 asked for everything with respect to that. There is
17 absolutely no limitation.

18 I don't know how to impress upon you that the case
19 has to be directed on both sides. It's not. It's swimming
20 in the ocean here. There's got to be direction. And there's
21 got to be a way to funnel, whether the funnel goes out and
22 large on the top, it starts small so that we're not asking
23 for everything in the world, thereby stalling this case for
24 years and years.

25 So -- yeah. Yes.

1 MR. DUNLAP: So we did attempt to narrow and
2 specify what we're doing. And I think it goes to three
3 specific areas, three specific areas. And, again, just want
4 to emphasize -- right? -- they chose to bring this tortious
5 interference claim. The meaning of the terms and conditions
6 is a central issue in that claim. It's a central issue.
7 They've taken the position that New Jersey applies. As I'm
8 sure you know, New Jersey contract law focuses on the intent
9 of the parties so parol evidence, extrinsic evidence is
10 highly, highly important.

11 So the three areas we are looking at, one is the
12 drafting history. The drafting history. We have zero
13 documents, zero documents, about the drafting of the "other
14 offer" provision, which is the central provision at issue in
15 the general terms and conditions. Not --

16 THE COURT: So do you think there will be emails
17 that redefine "other"? Or -- it's such a general term.

18 MR. DUNLAP: We have -- we believe that there was
19 never -- that Johnson & Johnson never actually believed that
20 the "other offer" provision applies to plan terms, which is
21 what is at issue here. I mean, at the fundamental, that
22 drafting history is primary evidence of what the drafting
23 party intended. And Johnson & Johnson is the sole drafter
24 here. They have told us that they drafted the "other offer"
25 provision as part of the predecessor program -- the

1 predecessor program or programs. They know what those
2 programs are. They know who worked for them. But they will
3 not tell us what the programs were. They will not tell us
4 who the employees were.

5 THE COURT: Is that the response that they will not
6 tell you?

7 MR. DUNLAP: That is the response. What they've
8 just said is, well, they have one custodian who worked on the
9 transition --

10 THE COURT: Right.

11 MR. DUNLAP: -- and they'll add a few months from
12 their documents, going back into 2015.

13 But they won't go back to the people who actually
14 worked at those predecessor programs and search for documents
15 that could go to the drafting here. That could go to the
16 drafting here.

17 THE COURT: How many drafts were there?

18 ATTORNEY FOR PLAINTIFF: Your Honor, I am not sure
19 how many drafts there were. Our document retention
20 effectively allows us to go back to about 2013. They've
21 asked us to go back to at a minimum 2009 --

22 THE COURT: We talked about this.

23 Go ahead.

24 ATTORNEY FOR PLAINTIFF: Yeah, and maybe beyond
25 that.

1 This term has been used in other pharma offers.

2 It's been used by Horizon, Uber --

3 THE COURT: Everywhere.

4 ATTORNEY FOR PLAINTIFF: -- everyone uses it.

5 We would love, Your Honor -- let me just cut to the
6 chase -- we would love to have a document that is like the
7 kind that Mr. Dunlap is describing, and we did go back and we
8 spoke to some people who are relative of the vintage of the
9 people who were there around 2013, '14, thereabouts.

10 We don't have nonprivileged documents to produce to
11 them.

12 And so what we offered to do was to do some
13 additional searching. And we engaged in some
14 meet-and-confer. They asked for what would have effectively
15 been 300,000 documents. We came back with a much smaller
16 proposal. And rather than continue to bargain over this,
17 they wrote to Your Honor and went to the Court.

18 So we have already produced documents about the
19 issues that they talked about. We've produced documents
20 showing how the terms and conditions are to be applied.
21 We've produced documents showing the 2022 changes -- 2022,
22 there were some changes made to the program for two drugs.
23 We produced instructions to our vendor TrialCard. We
24 produced call notes from thousands of calls at TrialCard, our
25 vendor, that actually talks to the patients. We produced

1 thousands of call notes from TrialCard to show how these
2 things are being done. We've done the best question. We're
3 willing to do a little bit more.

4 But we weren't willing to agree to 300,000 more
5 documents to review when everything we know indicates that
6 these documents will never be found. We're willing to do a
7 little bit more to try to bridge the gap.

8 But that wasn't enough, and they wrote to
9 Your Honor rather than take our interim offer or continue to
10 bargain. They actually moved up in the number of documents
11 at one point.

12 I'll stop.

13 THE COURT: I am not going to resolve the T&C --
14 the terms and conditions issues. I am not going to do it.
15 You're going to have to work those out yourself.

16 That's what you're going to come here -- and if
17 it's weekly, in person -- and work out terms and conditions.

18 I'm just not going to do it.

19 MR. MANGI: Your Honor, I have to --

20 THE COURT: Does this mean a district court is
21 going to have to decide what "other offer" means?

22 MALE SPEAKER: It's a key issue in the case,
23 Your Honor.

24 THE COURT: I know it is. But it's also -- you
25 know, ambiguous. And I know you're looking for something to

1 define it by my very words ambiguous.

2 But going back to the year 2000-and-whatever, if
3 there are 64 drafts, how is that going help you?

4 MR. DUNLAP: We don't know --

5 THE COURT: Towards intent.

6 MR. DUNLAP: We don't know what there is because
7 they won't tell us.

8 And they say, "Oh, you know, other drug companies
9 use it now, or Amazon uses it now."

10 Maybe. But that's the relevant. They drafted it.
11 They got it from somewhere.

12 And this is the standard contract --

13 THE COURT: But how does that go to how it was
14 utilized?

15 MR. DUNLAP: Because if we can show that when they
16 sat down to draft the "other offer" provision, they had some
17 understanding of what it would apply to and plan terms are
18 not on that list, that would be core evidence that they
19 don't -- they never really believed at the time of drafting
20 that it applies to the plan terms. It's the benefit terms at
21 issue.

22 THE COURT: But let me go back to my question --
23 because say there are 65,000 emails that say this is what
24 "other offer" means but it's never implemented in that
25 manner.

1 MR. DUNLAP: Yes.

2 THE COURT: What does it matter what their thought
3 process was prior to the implementation of "other offer" if
4 in reality the implementation had nothing to do with the
5 first draft or the third draft or the fifth draft?

6 MR. DUNLAP: Evidence of what they thought a
7 contract -- a final term meant at the time is absolutely
8 relevant.

9 THE COURT: At the time.

10 MR. DUNLAP: At the time that they drafted it.

11 Well, I was just starting the drafting history.

12 We also then need to talk about course of
13 performance, which I haven't even gotten to yet.

14 But the drafting history, we don't know what
15 drafting history there is.

16 Now, he said things -- the other side said things
17 about their retention policies going back to 2013, but their
18 letters are very carefully worded. They don't say they don't
19 have documents before then.

20 If they have documents, they need to go look
21 through them. If they're not reasonably accessible --

22 THE COURT: I thought we established that in the
23 last session.

24 MR. DUNLAP: No, I don't believe we did.

25 THE COURT: Okay.

1 MR. DUNLAP: I have not heard or seen anything.
2 They certainly haven't told us why their documents wouldn't
3 be reasonably accessible. And they haven't said they lack
4 documents from that earlier period.

5 If they're standing up and saying that now, that's
6 news to us, because that's not what they've said before.

7 If they have documents from the time period and the
8 predecessor programs, when this term, which is at issue here,
9 was drafted, they have to at least tell us what the programs
10 are, tell us what the employees were, and tell us what
11 document sources we have.

12 And they start throwing around these large numbers
13 of documents for drafting history. We have no idea what the
14 numbers are. We haven't even gotten to will they do searches
15 and run search terms so we can start agreeing on the number
16 of documents. We talk about we need to meet and confer.
17 They've shut us down. They've said, except for -- one
18 custodian in 2015, we are not going back any further. We're
19 not going to tell you what the programs are. We're not going
20 to tell you who the custodians are. We're not going to tell
21 you what the doc sources are. We're not going to tell you if
22 these are reasonably accessible or not. We are certainly not
23 going to give you any information on it.

24 And the idea that they can simply say --

25 THE COURT: And you.

1 MR. DUNLAP: -- "We are not giving you anything on
2 drafting because it was too long ago," I'm sorry, but we then
3 get to sue you and tell you what this contract means, I just
4 don't think is consistent with -- a contract.

5 MR. MANGI: So, Your Honor, I'll just answer that
6 very briefly. I'm actually not here to argue this motion. I
7 was here to say something else.

8 THE COURT: I really wasn't going to hear any
9 argument on this --

10 MR. MANGI: Okay. Then I'll just --

11 THE COURT: -- because, as I said, I want you all
12 to work this out.

13 MR. MANGI: Yeah, so then -- so then I won't even
14 respond to it.

15 Let me go to what I came here to say, then,
16 Your Honor.

17 Your Honor, I recognize fully your frustration with
18 the situation. I recognize it. We've anticipated it, and we
19 tried to find ways to avoid it. Clearly we didn't succeed
20 collectively. And I understand you want us to talk more.
21 And that's entirely fair and reasonable.

22 I wanted to just raise thought as to a potential
23 path forward in terms of what we have here.

24 Your Honor, if you look at the stack of motions
25 that are pending, setting aside now the two that you have

1 already resolved, here's what they are: Number 163 is the
2 one we've just been talking about, which is the terms and
3 conditions and other related issues tied to it. Right?

4 You will -- and, by the way, if you have the letter
5 from Mr. Greenbaum handy, I can point you to where they are.

6 THE COURT: I do.

7 MR. MANGI: Okay. So Number 1 in Mr. Greenbaum's
8 letter is 163. That's the terms and conditions issue that
9 you just started to hear about.

10 Now, that one, Your Honor, was, as you just
11 recognized, subject of an earlier motion. And we talked
12 about many of these issues then. And they're back now again
13 wanting to reargue that. And that's fine. That's their
14 right to bring it back. But it's been a subject of some
15 prior discussions.

16 Number 3 on Mr. Greenbaum's list, which is
17 Number 150, documents regarding finances, that's the same
18 thing in that we've been here on that before. Your Honor
19 denied that motion. They want to come back and raise the
20 same issues again, but we've been here on it once before.

21 Number 5 on Mr. Greenbaum's list, which is
22 Number 165, seeking additional custodians, that also, in
23 part, we've been here on before because, you remember, they
24 wanted other custodians, they wanted Janssen custodians, they
25 wanted some of same custodians who they're seeking now, but

1 they've also added other people to the list.

2 THE COURT: But doesn't this relate to the CAP
3 program, which is a newly --

4 MR. MANGI: That's the next one, Your Honor.

5 THE COURT: Oh, okay.

6 MR. MANGI: Which is Number 6 on this list.

7 Now, as regards -- and I'm going to get to that one
8 in just a minute.

9 As regards these three that I just went through,
10 all of which, either in whole or in part, we have been here
11 on before, we are happy to go back, confer more, and come
12 back if we need to, but I think what's critical on those is
13 the guidance that Your Honor just gave, which is you told
14 them last time, you're not granting this, you need to have
15 something that is a much more specific ask.

16 And if they can come back with a much more specific
17 ask, we've actually proposed some specific compromises that
18 have been rejected, maybe they'll revisit those, but with the
19 benefit of your guidance, it may be those because they've
20 already been here once, we can make some progress on if they
21 take guidance to heart.

22 The one that is new is Number 6, which is the CAP
23 program one, Number 166. And my suggestion, Your Honor,
24 would be, if Your Honor is amenable, that we argue that one
25 because that does raise some new issues.

1 On the other ones, frankly, I think it's really
2 very simple. We've been here before. We got a good sense of
3 what you thought of them last time. We got a better sense
4 today. If they're willing to come back with something
5 specific, we'll do our best to work it out and avoid coming
6 back because we know you don't want to deal with those
7 details.

8 On the CAP one, I think we need your help because
9 we haven't talked about it before.

10 So that's my suggestion, Your Honor, as one path
11 forward.

12 THE COURT: That's Number 1 on Mr. Wohlforth's --

13 MR. MANGI: Yeah, they're eager to resolve that.
14 And that's fine. I would actually like to argue that one.

15 But, you know, on the other ones -- that's my
16 thought, Your Honor. But, of course, we're happy to do
17 whatever you want us to do.

18 And I suspect, while we're happy to go in the back
19 room and do it, they're going to need to think pretty hard
20 about how can narrow their asks. I suspect they'll want to
21 talk to their --

22 THE COURT: Good. You have a week. I'll bring you
23 back next week.

24 MR. MANGI: Okay. That's fine.

25 THE COURT: But that's with respect to the T&Cs. I

1 mean, you've got to narrow it. You've got to do it.

2 MR. MANGI: Yeah.

3 And our view, Your Honor, is that the exact same
4 principle is in play in the other two that we've been here
5 before on: Finances and, you know, they want 12 new
6 custodians.

7 And similarly, if they have more specific asks, you
8 know, we can talk about those with them. But CAP is somewhat
9 different issue.

10 THE COURT: Well, I thought CAP, the 12 new
11 custodians included CAP custodians.

12 Am I wrong about that?

13 MS. NELSON: No, you're correct, Your Honor. So --

14 THE COURT: Seven CAP custodians?

15 MS. NELSON: On the custodians, I'll just say
16 briefly, I disagree with some of the statements that have
17 been made.

18 It is true that some of the custodians relate to
19 issues we've heard before, but not all of them. And, in
20 fact, some of these custodians were just disclosed to us in
21 the amended interrogatory responses that we received in July.
22 So --

23 THE COURT: And --

24 MS. NELSON: So these are not all old issues.

25 THE COURT: -- are seven of those CAP custodians,

1 | though? Because I'm going to open the doors on CAP.

2 | MS. NELSON: Some of them, yes. A number of them,
3 | I would say -- I have to count, but -- around half of the
4 | ones we ask for related to CAP.

5 | THE COURT: And what have you offered in terms of
6 | CAP?

7 | MR. MANGI: Yeah, so we actually have some new
8 | stuff here as well, Your Honor, on the CAP program.

9 | THE COURT: Did you want to say something before he
10 | continued?

11 | MR. ELSBERG: Yes, Your Honor, David Elsberg.

12 | THE COURT: I'm always criticized for having a
13 | free-for-all in my courtroom.

14 | MR. ELSBERG: Well, this one's my fault,
15 | Your Honor.

16 | THE COURT: Go ahead.

17 | MR. ELSBERG: And David Elsberg.

18 | THE COURT: Yes.

19 | MR. ELSBERG: We actually strongly agree -- we
20 | strongly agree the CAP motion being argued today --

21 | THE COURT: Okay.

22 | MR. ELSBERG: -- because they're extraordinarily
23 | important documents, and I would suggest that --

24 | THE COURT: That was the plan.

25 | MR. ELSBERG: Okay. Thank you, Your Honor.

1 And I would suggest that before opposing counsel
2 starts talking about CAP, it's our motion. I would like to
3 argue it, and then counsel can respond.

4 MR. MANGI: I would --

5 THE COURT: You're up there. Go ahead.

6 MR. MANGI: Okay. Thank Your Honor.

7 All right. So let me start, Your Honor, with the
8 question that you asked, and then I'll make a couple of
9 additional points.

10 The question you asked is what are we giving them
11 on this CAP program? Right?

12 And let me preface this, Your Honor, by saying, I
13 remember from last time, your approach on these issues is,
14 one, you don't want the world of discovery opened up because
15 cases have to be practical. But you want them to have what
16 they need to be able to defend against the claims.

17 And that is the criticism through which we have
18 approached this issue.

19 Now, the parties here have in this case agreed on
20 one thing -- I know there are not many things we agree on,
21 but we agreed on thing, which is we agreed on a time frame
22 for discovery. And we agreed that time frame was April 2014
23 through July 1st, 2022.

24 And of course that's just an entirely practical
25 accommodation because discovery has to end somewhere. We

1 have to collect those documents, process them, produce them,
2 and then we move on to depositions and then to trial. We're
3 at the deposition phase now. The first deposition is
4 scheduled for next week.

5 So when they raise the issue of wanting these
6 custodial documents -- and, Your Honor, let me just describe,
7 this is an important distinction -- all right? -- between
8 custodial documents where we have to go, search through
9 individual peoples' emails and you get a lot of junk, a lot
10 of false hits, a lot of manual review, but those on one hand,
11 and on the other hand, noncustodial stuff where you know what
12 you're looking for, you get it from a central source, you can
13 produce it. Much less burden on the noncustodial side;
14 right?

15 So we agreed that for the searches that they want
16 on the CAP program, we'll go back and we'll do custodial
17 searches but only through until the cutoff. And that alone
18 added some 32,000 documents. Many of them are going to be
19 false hits.

20 But they also, Your Honor, don't want to do any
21 meaningful custodial discovery beyond that 2022 cutoff,
22 because they know that's going to be very hard on their side
23 also. In fact, all they've agreed to do past that cutoff and
24 noncustodial stuff. The only custodial discovery they agreed
25 to is one very narrow piece from one custodian that will

1 | probably have a handful of documents.

2 | But everyone is agreed that we are going to apply
3 | this cutoff as a practical limitation to the case, can go
4 | forward. And we'll have some exceptions beyond that where
5 | they're necessary. But those have tended to only on the
6 | noncustodial side because the custodial side inevitably bogs
7 | the case down, restarts --

8 | Now, with that in mind, we still want to ensure
9 | that we can give them what they need to defend the case
10 | because I know that's something Your Honor is going to
11 | demand. So here's what we have thought we're going to do,
12 | Your Honor. Their whole point here is they say, as you heard
13 | from this morning, this CAP data, what they're asking for
14 | here through these searches going to show that J&J was
15 | getting information that told us who is in SaveOn. And so if
16 | we wanted to cut them off, we could have cut them off.
17 | That's the premise underlying all of this.

18 | So what we have said is, look, you don't need to --
19 | us to go look for every single email that talks about CAP or
20 | anything to do with this. Your real point is you want to
21 | know what data we have, telling us who is in SaveOn. And
22 | then when you have that, you can argue whatever you want,
23 | based on whether they have the data, they didn't take action,
24 | fine.

25 | So on a noncustody basis for the period of after

1 the cutoff, here's what we've agreed to do, Your Honor.
2 First, we have agreed to give them documents that will show
3 all of the final reports that we got from our vendors who
4 were tasked with analyzing this issue, we're trying to find
5 out who is a maximize, an accumulator-type program. So all
6 of those reports that assess whether they can identify
7 individuals enrolled, we told them we're going to give you
8 those. We are going to give you those through to the
9 present. So we are going to give them all of that, that
10 underlying data that they're most interested in.

11 Then that's the stuff that we're getting from our
12 vendors. And this task largely outsourced to vendors who are
13 data experts to try and do this for us.

14 But then if we had internal, any of our own
15 internal analyses, trying to assess whether it's possible to
16 identify individuals enrolled in these accumulator or
17 maximizer programs internally, we said, we'll give you those
18 too, and we'll give them to you through to the present.
19 We'll get those -- collect those specifically without having
20 to search through hundreds of thousands of emails.

21 Third, we have said, okay, you're saying, well, you
22 know, we talked about -- about we can enforce these now
23 because we know who these people are, we can cut them off.
24 We said, okay, if we have documents that will show sufficient
25 to show any attempts to enforce our terms and conditions

1 against these individuals, to the extent those exist, we'll
2 give you those through to the present, again, without a
3 cutoff.

4 And, the Court, the actual transactional data that
5 is associated with the program, all of the people enrolled,
6 the datas of enrolled, what we are paying, what we're not
7 paying, what they may need to assess any of these analyses,
8 we'll do all of that through to the present.

9 Let me add to that one new point that's not in the
10 letters. As we have been working to prepare for this
11 hearing, looking at other things we can do to try to resolve
12 this, we noticed, Your Honor, that a lot of what they are
13 pointing to -- in fact, I would say almost all of what
14 they're pointing to in these exhibits to their motions are
15 benefits investigations; right? And these are where they
16 say, okay, you looked into a particular patient and may be
17 you figured out whether they're in SaveOn.

18 And as we pointed out to you, Your Honor, for the
19 vast majority of this time period, benefits investigation had
20 nothing to do with any of these issues. It was about is this
21 a government patient? Is this a commercial patient? Do they
22 have any coverage? Not looking at this stuff at all.

23 Right towards the end of the time period for
24 discovery, that phrase, we've now identified, started to be
25 used also to refer to an additional set of documents where

1 they are trying to figure out is someone in an accumulator or
2 a maximizer or a program like this?

3 And so we wrote Your Honor and said, look, just for
4 a narrow time period, but we have now seen that phrase is
5 used in that way, so we'll produce those for that relevant
6 time period.

7 But now, Your Honor, we'll make an additional
8 concession. In addition to all of the categories that I just
9 pointed out, we will also give them through a production from
10 TrialCard, which is our vendor, who we also represent and is
11 subject to a subpoena, we'll give them benefits
12 investigations that find any patient in a maximizer or a
13 accumulator through to the present. Through to the present.

14 So between all of those sources, Your Honor, I have
15 just identified, they have more than enough to be able to
16 make whatever arguments they want about mitigation without
17 needing to say, okay, now, even though depositions are
18 starting next week, we want you to start going through
19 hundreds of thousands of emails to find any stray mention of
20 these issues. We don't need that because we are going give
21 they will the actual data that is underlying all of this.

22 Let me point -- make one last point, Your Honor,
23 and then I'll sit down.

24 I just want to address -- I wanted to first assure
25 Your Honor that we've heard your concerns. We've looked to

1 | give them what they need. But I do also want to address this
2 | premise underpinning this motion. And it's important because
3 | it goes to proportionality. The premise they make -- and you
4 | heard it from counsel today -- is they say we, JJHCS, have
5 | made, quote, a strategic business decision or a volitional
6 | choice -- these are all phrases from their phrases -- not to
7 | mitigate. All right? So they are telling Your Honor, we
8 | know who's in SaveOn. We're confident. We are certain. But
9 | we are choosing voluntarily to keep giving them money.
10 | Therefore, we have failed to mitigate, and we shouldn't get
11 | damages for them. That's what underpins all of this.

12 | Now, Your Honor, I saw you nodding when
13 | Mr. Greenbaum was speaking earlier so I know that you
14 | remember this issue about patient lists that came earlier. I
15 | want to return that for just one minute because it's very
16 | important in this regard.

17 | Remember, Your Honor, what happened on that patient
18 | list issue. We came in, and we said, "We don't have any
19 | information that tells us with confidence who is in SaveOn."
20 | This is a very tricky issue because we don't want to cut
21 | patients off if we don't have reliable --

22 | But now there's list, and that list will
23 | definitively tell us who's in SaveOn because they generated
24 | it, so allow us to use that to mitigate. And part of that,
25 | obviously, is them taking those people out of the program.

1 They came in and they said, Your Honor, J&J's
2 intent on mitigating and cutting these people off. Don't let
3 them do that because that's going to cost us hundreds of
4 millions of dollars. That was their argument.

5 Now, Your Honor, if you think about that for a
6 moment, both things cannot be true. On the one hand, they
7 are saying J&J is so intent on mitigating that if you give
8 them the patient list, they'll cut people off. That will be
9 terrible. Please didn't let them do that. That's what they
10 said a few weeks ago.

11 And now they're saying, J&J has no intention of
12 mitigating. They don't want to be mitigate at all. They're
13 intentionally making a conscious choice to pay people money.

14 These two things cannot be both be true.

15 Now, what's really happening here, I'll tell you in
16 very short. What we said to you, before, Your Honor, is the
17 reason we need their list to be able to cut people off is
18 because they are at pains to try and obscure and hide what is
19 in SaveOn from us. So the information that we have is
20 uncertain. It's guesswork. We can't take action based upon
21 it. That could harm patients.

22 Now, we have some initial documents from their
23 files going to this issue. And what do they say? These are
24 all exhibits that we've submitted to Your Honor. But they
25 say things like -- these are their internal documents --

1 they're going to change their payment structure and vary the
2 amounts that they pay per month to, quote, [REDACTED]
3 [REDACTED] They say they're changing
4 things so that they're taking a co-payment funds will be,
5 quote, [REDACTED] They say
6 they're making efforts to, quote, [REDACTED]
7 [REDACTED]
8 [REDACTED] Closed quote.

9 So, Your Honor, what mitigation requires is for us
10 to make reasonable efforts to not run up a bill. Right?

11 But here this is a world apart. We have SaveOn,
12 whose whole business model is making intentional efforts, as
13 their own documents reflect, to prevent us knowing who is in
14 SaveOn. And then they come in here and have the temerity to
15 say, well, J&J's intentionally, consciously, volitionally
16 making these payments. Those two things can't be true at the
17 same time either.

18 So I just want to point out because they've gone
19 back a few times and say J&J doesn't challenge this, doesn't
20 challenge that. We absolutely challenge the premise of this
21 motion and everything underpinning it.

22 But for present purposes, all I have to say --
23 because I know Your Honor is careful about not wading into
24 the merits. You want to deal with the issue in front of you.
25 And on the issue in front of you, we have an agreement on a

1 time frame for discovery. We have abided by that. More
2 custodial searches are not rational or reasonable at this
3 stage when the substantial completion was back in September
4 and we are now pressing into depositions. This case has to
5 press forward. Important things depend upon it.

6 But to ensure that they have what they need, we're
7 going to give them that long list of things that I pointed
8 to, and then they can come and make whatever arguments they
9 want when we're at trial, and we'll oppose them then. But we
10 should not be reopening custodial email searches at this late
11 date when they're not going to add to the specific data-based
12 arguments and underlying discovery that we already said we
13 are willing to give them.

14 THE COURT: Okay.

15 MR. MANGI: Thank Your Honor.

16 THE COURT: When was the CAP issue disclosed?

17 MR. ELSBERG: Your Honor, it was disclosed to us
18 when they very belatedly produced documents in June. In
19 June. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 So it was their belated production. We then
24 immediately -- but in July sent a letter saying, hey, we have
25 this issue.

1 And, Your Honor, if I may -- may I give you a
2 hand-up that I think will help.

3 THE COURT: Does your adversary have a copy?

4 MR. ELSBERG: I'm handing them right now. There's
5 nothing on it -- there's no --

6 THE COURT: Okay.

7 MR. ELSBERG: So you have two hand-ups here.

8 If I may --?

9 THE COURT: Certainly.

10 MR. ELSBERG: So, Your Honor, again, David Elsberg
11 for the record.

12 Your Honor, I'll begin with what was a core premise
13 of the argument that we just heard. We heard an argument
14 that they've given us lots of categories of documents and
15 that should be enough. And more specifically, they said,
16 "We'll give summary reports -- enough, we'll give you the
17 summary reports."

18 The problem with those so-called summary reports is
19 that data told us that their information is unreliable. And
20 we just heard counsel say it's guesswork. So whatever effort
21 they've made to put together these summary reports out of
22 their own mouth, it is unreliable and guesswork. So we
23 certainly should not have to accept that.

24 And even if they hadn't said it's guesswork, we
25 still -- a summary by definition omits information. That's

1 what it is. It's not the underlying data. It's somebody
2 deciding I'll put some data in. I'll leave some data out.

3 And, Your Honor, if you would look at the first
4 hand-up, it's labeled Hand-up Number 1. There's some
5 important information on there because what's very different
6 from any summaries they would give us is this underlying
7 data.

8 So what these documents show, on Hand-up 1, if
9 Your Honor looks at Row A. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 So it's not in the summaries that you're going to
22 get this information that shows J&J had the information from
23 the most reliable sources, from Accredo, from ESI or Express
24 Scripts.

25 And we heard counsel say that not only are these

1 entities business partners -- SaveOn and Express Scripts and
2 Accredo -- they said it's a conspiracy. And the only reason
3 I bring that up is because they are correct that these
4 entities, their business partners. They share information,
5 they are the Beth source. The best source of which patients
6 are SaveOn patients.

7 [REDACTED]
8 [REDACTED] any summary is not going to
9 include the detailed data like this. It will leave it out.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 And they could limit it completely. They could lower the
20 payment. Or they can pay them exactly the same amount that
21 other patients who are not on SaveOn.

22 And they chose the last option. So, again, no
23 causation, utter failure to mitigate, incredibly important
24 documents.

25 So we heard one argument which, again, supposedly

1 they had given us everything that we need.

2 They have not given us everything we need, and we
3 know that because, again, these summaries, they do not
4 contain this information. I'd ask Your Honor to put that
5 question to them: Is it going to contain --

6 THE COURT: I don't need to. Tell me what else you
7 need.

8 MR. ELSBERG: Yes. So, Your Honor, this is what
9 we -- this is what we need. Whatever else they say they did
10 during this time period at issue, which is a time period
11 where they are seeking damages, whatever else they did, I can
12 tell you what they did not do.

13 What they did not do is run the most obvious, the
14 most basic, the most important search terms that would run to
15 find these CAP documents. So, for example, they did not run
16 the term "CAP A." "CAP A" is a term that Johnson & Johnson
17 used to identify patients who are on accumulators. That's
18 what the "A" stands for.

19 THE COURT: Did you meet and confer on the search
20 terms?

21 MR. ELSBERG: Yes, Your Honor.

22 THE COURT: And did you agree to certain search
23 terms?

24 MR. ELSBERG: They refused -- oh, yes, we did,
25 Your Honor. And I'll get back to why these were not on the

1 original list.

2 THE COURT: Okay.

3 MR. ELSBERG: So they've made an argument about why
4 didn't we do this earlier, and I will get to that, and I'll
5 get to that next, if it's okay.

6 THE COURT: Okay.

7 MR. ELSBERG: So they didn't run these search
8 terms. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 And SaveOn, they've said, is similar to either/or
14 both of those categories. [REDACTED]

15 [REDACTED]
16 [REDACTED]

17 And they've also refused to run the term
18 "adjustment program," even though these are adjustment
19 programs, and the adjustment programs are dead center at --
20 in the middle of this case because the question is did they
21 or did they not adjustment the payments, lower the payments,
22 eliminate the payments when they knew somebody was a SaveOn
23 patient? These documents will show they kept paying; so no
24 damages.

25 So whatever else it is they do, certainly they

1 should have to do this, these two search terms.

2 Now, Your Honor, what they say and I believe what
3 Your Honor just asked about is why -- why didn't we do this
4 earlier? Back when the search terms were being negotiated,
5 why didn't we bring this up?

6 And I have to say -- I'll just say it's surprising
7 to me that they would make that argument. And I'll tell
8 Your Honor why. If Your Honor looks at Hand-up 2, which
9 we'll see is that -- well, before I even get to Hand-up 2,
10 way back when the beginning of the case, when the parties
11 were meeting and conferring about what should the search
12 terms be, Johnson & Johnson hid the existence of these
13 programs. They didn't say, look, we're talking about where
14 relevant documents will be. [REDACTED]

15 [REDACTED] They didn't tell us that they
16 had these programs at the very beginning of the case, much
17 less did they say, we're going to propose search terms that
18 refer to CAP. So we didn't know about it at the beginning of
19 the case.

20 THE COURT: Okay. So the only search term
21 negotiation was at the startup of the case?

22 MR. ELSBERG: We've returned to it more recently.

23 THE COURT: Right.

24 MR. ELSBERG: Again, if you -- this will take two
25 minutes. I want to explain why we didn't do it earlier.

1 It's not just that they failed to disclose to us
2 the existence of these programs, it gets worse -- because
3 they made affirmative representations to us, to SaveOn, and
4 to Your Honor which, whether intentional or not, certainly
5 misled us, meaning SaveOn -- of course I am not speaking for
6 Your Honor. But it misled us about whether or not there were
7 even any documents that they could look for.

8 So this is where Hand-up 2 comes in. If you look
9 at Hand-up 2, these are five examples of many, and these go
10 all the way back to May 2022 when they filed their complaint.
11 These are five examples of representations that were made to
12 us and also -- "us" meaning SaveOn -- and also to Your Honor.
13 So May has that 4, 2022, that's their complaint. They say
14 it's unworkable for them to reliably identify SaveOn
15 patients.

16 June 2, 2023, Row 2, joint letter to Your Honor,
17 JJHCS personnel cannot determine who these patients are with
18 reasonable or necessary certainty.

19 Row 3, the only reliable way for them to identify
20 SaveOn patients is to get our patient list.

21 And then they say in Row 5, they've never been able
22 to, never been able to definitively identify patients on
23 SaveOn.

24 Well, we know, because we just looked at the
25 documents -- and if Your Honor looks back at Hand-up 1 -- you

1 mentioned this before -- in these rows you can see, they
2 didn't just have the information; they verified with the best
3 sources of, and Express Scripts, with Accredo, with SaveOn.

4 So it was not true when they kept telling us,
5 "Listen, we just don't have records. We just don't have
6 them." It was not true. And what's worse, Your Honor, is
7 that the examples that are on Hand-up 1, [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] when they filed their complaint.

12 So they knew better when they made the representation in
13 their complaint and then over and over to Your Honor and to
14 SaveOn.

15 So for a very long time, they're telling us,
16 "Nothing to see here. Nothing for us to get here. We just
17 don't have it. We could never do it with any reliability."

18 It turns they could and they did.

19 Now, on top of all that -- they didn't disclose it
20 at the beginning, we're negotiating search terms, and they
21 were leading us to believe there's nothing for you to look
22 for as we simply were never able to do it, they belatedly --
23 they did not produce the vast majority of their production
24 until June of 2023. And it's when we started reviewing those
25 belatedly produced documents in June of '23 where we said

1 hold on a second. These documents we're seeing are flat
2 inconsistent with what they've been telling us all along, and
3 they never said to us there's this program. Here are
4 proposed search terms, like CAP A, CAP M, adjustment program
5 that will catch them.

6 So just one month later in July, after we had been
7 reviewing these documents, we sent them letter. It's date
8 July 18th, and it's Exhibit 23 to the CAP letter. And we
9 started chasing them. We started chasing them. So we moved
10 very promptly.

11 So that's why I say, to put it mildly, it's
12 surprising to me that they would say where were we? Why
13 didn't we ask earlier? We're now in depositions.

14 Yeah. This all should have happened earlier, and
15 it would have if they had acted -- if they had acted
16 differently.

17 I also wanted to say, Your Honor --

18 THE COURT: Let me ask you a question.

19 MR. ELSBERG: Yes.

20 THE COURT: You want underlying data. You want
21 search terms to include CAP A, CAP M, and.

22 MR. ELSBERG: Adjustment programs.

23 THE COURT: Adjustment programs.

24 And what else do you want?

25 MR. ELSBERG: Those -- those -- that is what we're

1 looking for.

2 THE COURT: In addition to what they're giving you.

3 MR. ELSBERG: The other stuff that they said they
4 would give us does not give us what I'm asking for now.

5 So the answer is yes. We want these obvious search
6 terms to be run and to run through 2023. And the reason I
7 say through 2023 is they have made that time period relevant.
8 They have said they're going to seek damages --

9 THE COURT: What's the start date again?

10 MR. DUNLAP: April 2016.

11 THE COURT: 2016.

12 MR. DUNLAP: Your Honor.

13 THE COURT: Right, Tim?

14 MR. ELSBERG: What we are talking about is less
15 than -- I believe less than a year and a half of --

16 THE COURT: You want it through today.

17 MR. ELSBERG: Yes, Your Honor. If they're going to
18 be seeking damages through today. Through whatever date it
19 is they're seeking damages.

20 THE COURT: That is my question for them, but,
21 yeah, okay.

22 MR. ELSBERG: They can either stipulate they are
23 not going to seek damages for a certain period. They can
24 either stipulate that they're not going to seek damages --

25 THE COURT: Okay.

1 MR. ELSBERG: -- or they should give the -- they
2 should give the documents.

3 THE COURT: Okay.

4 MR. ELSBERG: And my colleague is making a good
5 point to me that I should say, Your Honor, [REDACTED]
6 [REDACTED] So we are not
7 talking about a very long time period here.

8 THE COURT: So in terms of search terms for CAP A,
9 CAP M, and adjustment programs, it's 2022 through today.

10 MR. ELSBERG: Yes. It's 2022 through whatever date
11 it is that they're seeking damages.

12 THE COURT: The damages. Okay.

13 What else do you want?

14 MR. ELSBERG: That's what we're seeking on this
15 one.

16 THE COURT: What about these seven custodians that
17 we were talking about before?

18 MR. ELSBERG: I'll let my colleague Meredith Nelson
19 address that, if that's okay with Your Honor.

20 MS. NELSON: Yeah, thank you, Your Honor.

21 So in our custodians motion, you're right. There
22 were seven custodians who we specifically identified as
23 related to the CAP program.

24 THE COURT: Right.

25 MS. NELSON: There are also a few others who the

1 documents we cited show their involvement in the CAP program.
2 So, for instance, there are a couple of members of the JALT
3 who received a full presentation [REDACTED]
4 [REDACTED]. There is also a woman -- her name is
5 Juliette Deches [phonetic] -- [REDACTED]
6 [REDACTED]
7 [REDACTED], which is
8 a huge issue; right? [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 So what I would suggest -- I think that there is a
15 potential compromise that we could offer where we don't go
16 for all 12, but there are at least six -- and I'd want to
17 communicate with others, far senior to me at the table, but
18 there are at least six custodians where we have strong
19 evidence of their No. In CAP, and you would ask for those to
20 be added.

21 MR. MANGI: May I respond?

22 THE COURT: Okay.

23 MR. MANGI: Thank you, Judge.

24 Your Honor, I'm going to get to these search terms
25 in just a minute because, actually, the nature of the search

1 terms is quite important here. Bet let me just touch on a
2 few points before that, if I may.

3 First, you just heard this big presentation
4 suggesting that we've been hiding this from them for months.

5 THE COURT: What if I told you I don't care about
6 that?

7 MR. MANGI: Then I'll put it aside.

8 THE COURT: Good.

9 MR. MANGI: Okay.

10 Let me turn to these specific issues.

11 Now, Your Honor, they said that the example they
12 picked for you -- right? -- of why they need all this, from
13 all the stuff, the one they chose is in this handout, the
14 first exhibit, this document is what he just took you
15 through, this is a benefits investigation.

16 THE COURT: Yes.

17 MR. MANGI: Right? That is what I said to you when
18 I first got up, we're voluntarily going to give them all of
19 these, all the way through to the present already.

20 THE COURT: Okay.

21 MR. MANGI: We don't need to get into any emails or
22 any search terms for that.

23 THE COURT: Who writes the summaries?

24 MR. MANGI: Okay. So then let's talk about what
25 they're calling "summaries." And so they seem to be drawing

1 a distinction between -- they're suggesting, well, this data,
2 we're not giving them the data. What we're giving them is
3 just a summary --

4 THE COURT: Right.

5 MR. MANGI: -- and the summary is unreliable.

6 Okay. That's just not right. And let me explain
7 to you why, Your Honor.

8 We have vendors. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 THE COURT: Do you get the data with the summary?

16 MR. MANGI: We have access to feeds of data. But
17 we're not -- we're not downloading that and keeping it.

18 What we're studying are reports they put together
19 from the analysis -- from the data and sent to us.

20 THE COURT: So they look at their data.

21 MR. MANGI: Correct.

22 THE COURT: Do you feed into that data?

23 MR. MANGI: What do you mean?

24 THE COURT: Do you participate in supplying the
25 data to the vendors?

1 MR. MANGI: It's their data. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 If we are doing any internal analyses, looking at
7 our own data, we have given them and will give them the
8 underlying data -- because I told you, we're giving them all
9 of the underlying transactionable claims data for our program
10 through to the present -- we'll give them that -- and any
11 analyses that we did of that data, we're going to give them
12 that too.

13 THE COURT: Okay.

14 MR. MANGI: So there is no notion that there's some
15 pool of data that we are sitting on that we're hiding from
16 them.

17 THE COURT: No. I am not saying that.

18 MR. MANGI: Yeah.

19 THE COURT: But I'm curious because when you get a
20 summary -- I don't care if it's from you or an outside
21 vendor.

22 MR. MANGI: Yeah.

23 THE COURT: -- I don't understand why the data
24 shouldn't accompany the summary because --

25 MR. MANGI: Your Honor, because these are -- I'm

1 | sorry. I didn't mean to interrupt.

2 | THE COURT: Go ahead. No. That's fine.

3 | MR. MANGI: The -- we're talking -- the underlying
4 | data from which we're -- some of these analyses are drawn.

5 | THE COURT: Right.

6 | MR. MANGI: We're talking massive, massive
7 | datasets. This is not like an Excel spreadsheet.

8 | And a lot of this is highly proprietary data, that
9 | these vendors --

10 | THE COURT: Well, that's what I wanted to hear.

11 | MR. MANGI: Yeah.

12 | THE COURT: How is it highly proprietary?

13 | MR. MANGI: Because a lot of companies, Your Honor,
14 | in this market exist to -- their aggregate data and then sell
15 | analyses of that data to other market participants.

16 | You may have heard, for example, in other cases or
17 | IMS health, which is now called IQVIA. That's probable the
18 | most famous example of them. But studying and selling data
19 | is big part of the market for pharmaceuticals generally. In
20 | fact, some of their partners, ESI and Accredo sell data
21 | themselves.

22 | So my point here, Your Honor, is ultimately if they
23 | want to know what data is available out there on the
24 | marketplace, you know, go get an expert or go subpoena these
25 | data vendors and you can do that.

1 If you want to know what analyses we got from
2 vendors -- right? -- what reports we purchased --

3 THE COURT: You are going to give it to them.

4 MR. MANGI: We're going to give that to them.

5 Okay?

6 THE COURT: Okay.

7 MR. MANGI: So they don't need -- there's no --
8 there's no pool of data that we are sitting on that we are --
9 that we are somehow hiding from them.

10 Now, let me turn to the search terms, because this
11 is important, the search terms, Your Honor, are "CAP M," "CAP
12 A," and "Adjustment program." You'll notice something about
13 those. None of are limited to SaveOn. Right? And we are
14 clearly very focused on SaveOn in this litigation for obvious
15 reasons, but there is a.

16 MS. HAIGNEY-LONG: List of companies out there in
17 the market that are in this category of maximizers or
18 accumulators. Right? Some of them have been involved in
19 other litigation with other pharmaceutical companies, but
20 there's a long list of them, maximizers, accumulators, they
21 are the subject of movements in various states to outlaw them
22 as a matter of state law. Many states have outlawed them.

23 But this is not specific to SaveOn. There are
24 dozens and dozens of companies that fall under this rubric of
25 maximizers or accumulators.

1 And while we're very focused on SaveOn and we've
2 sued them because they think they're one of the most
3 egregious actors in the industry, that doesn't change the
4 fact that there are lots of other entities that are out
5 there.

6 Now, when you go looking for anything to do with
7 CAP A or CAP M or adjustment program, none of have is limited
8 to SaveOn. And that is part of why it would pull in reams
9 and reams of material and hits here. They haven't chosen to
10 limit their search terms any way that -- and, by the way,
11 Your Honor, they deny that they are maximizer. In their
12 internal documents, they say, we're not a maximizer. If
13 anyone is asking with you, "Are you not a maximizer?" No,
14 you're not in a maximizer. We are not a maximizer.

15 So they're asking discovery that by their own term
16 may not even apply to them.

17 THE COURT: So if you -- did -- when you ran the
18 search terms --

19 MR. MANGI: Yeah.

20 THE COURT: -- did you run CAP A with the qualifier
21 of SaveOn?

22 MR. MANGI: No. We ran -- for the time period in
23 which we ran them, which was the time period up to the cutoff
24 of July of 2022.

25 THE COURT: Right.

1 MR. MANGI: We ran the search terms that they asked
2 for. And those turned up, you know, 32,000-something hits,
3 and, you know, we're making our way through those.

4 Now, let me turn to one other issue, Your Honor,
5 that this is tied to. They're suggesting to you that, look,
6 it is some narrow search. And while all of this other stuff
7 Mr. Mangi has agreed to give us is great, we really want the
8 custodial searches to be done.

9 And, Your Honor had the question tied to that of
10 when are we -- when are we seeking damages through --
11 right? -- tie that to that. And you said you wanted to ask
12 me; so I'm going to fold that into this issue.

13 Here's the issue, Your Honor. In this case, we're
14 bringing case against them that has a lot of similarities to
15 a fraud case in that we're saying you were up to something.
16 We think it was very bad. We didn't know about it until a
17 certain point in time. We found out. We sued you. Okay.

18 So what discovery are we, as the plaintiff, going
19 to have about that? Well, we're going to have discovery
20 relating to how we found out and when we found out about what
21 they're doing, which we've, of course, agreed to give.

22 And then there's going to be discovery about our
23 efforts to deal with this going forward. That is basically
24 what we have -- right? -- in terms of custodial documents and
25 emails. We don't have documents about the operation of the

1 SaveOn scheme because we are not operating it; they are.

2 So when they say that they want to do an update,
3 setting aside for a minute, even what the specific search
4 terms are, but when they say they want to update through to
5 the present, getting at every internal email we have about
6 this, what that is tantamount to, Your Honor, is asking us to
7 do a wholesale update of our document production through to
8 the present.

9 But we only have discovery from them through to
10 2022.

11 THE COURT: When are your damages cutoff?

12 MR. MANGI: Our damages are continuing. Our
13 damages are accruing even now that.

14 THE COURT: Okay.

15 MR. MANGI: And they will continue to accrue, which
16 is why the parties have agreed that when it comes to the
17 underlying data, we are going to do supplements and updates
18 of that: One later this year and another one later, closer
19 to trial -- because of that those specific issue.

20 But want to -- let me just point out. I really
21 want to focus on because this is important, on the unfairness
22 inherent in what they're proposing.

23 When it comes -- remember I read you those notes
24 about how they're trying to evade and camouflage what we do?
25 They've only given us that information through to July of

1 2022. They refuse to give it any further than that.

2 THE COURT: Well, I can fix that. I can have them
3 deliver that through today.

4 MR. MANGI: Right. So --

5 THE COURT: And you can do the search terms CAP A,
6 CAP M, adjustment program, SaveOn through --

7 MR. MANGI: Well, they're -- but they're --

8 THE COURT: Today.

9 MR. MANGI: Maybe we're going in a direction there,
10 Your Honor, but let me address both sides of that.

11 First, if we are going to do an update of our
12 production through to the present, basically what's
13 tantamount to a full update -- because that's what this gets
14 to -- they should do a full update of their production to the
15 present.

16 THE COURT: I agree that both sides -- if your
17 damages are continuing through to trial or whatever the
18 cutoff date may be --

19 MR. MANGI: Yeah.

20 THE COURT: -- I think both sides have to update
21 everything through the date of damages.

22 MR. MANGI: Okay. But here's my only concern,
23 Your Honor, and let me point out why that presents an issue.

24 Your Honor will recall they have twice come to you
25 seeking extensions of the schedule here, and we've two

1 extensions so far. Right?

2 It is very important to us to get to trial in this
3 case because with every month that goes by, there are
4 hundreds of millions of dollars being transferred.

5 THE COURT: So why don't you settle the case and we
6 don't have to worry about this?

7 MR. MANGI: Well, they'd like offer to pay us our
8 damages and stop doing what they are doing, we could.

9 THE COURT: We have to know what the mitigation
10 was, then.

11 MR. MANGI: Well, as a practical matter,
12 Your Honor, before we even get into, you know, what the
13 discovery should be or what the mitigation should be, there
14 is a practical start, position here, which is if our goal is
15 to move this case forward, to get to trial, then document
16 discovery has to stop somewhere. I mean, this is not the
17 first case with ongoing damages. Right? This happens all
18 the time. But you pick a date, and you say, okay, you know,
19 this is a practical accommodation. That's what we're going
20 to do.

21 Now, you know, we update everything through to the
22 present on both sides tomorrow -- right? -- but let's say our
23 trial is in August of 2023 -- I'm just guessing here; there's
24 no schedule. But then they pop up again in June and say, oh,
25 you know, we need to update again. And every month that goes

1 by and they push this off --

2 THE COURT: Well, you all can meet and confer and
3 select a cutoff date for damages and failure to mitigate.

4 MR. MANGI: Well -- but, Your Honor, our damages
5 are continuing through to the present. That's going to
6 remain the case.

7 THE COURT: Well, then their failure to mitigate
8 has to continue to the same date.

9 MR. MANGI: But then if that is going one way and
10 they are going to get some discovery on CAP, et cetera, then
11 we want their discovery updated too. And I've heard
12 Your Honor say you agree that's --

13 THE COURT: Yeah.

14 MR. MANGI: -- so my point is, Your Honor, there
15 has to be -- it cannot be the case that in every case where
16 there are ongoing damages, you continuously update your
17 document productions through to the date of trial. It's
18 impossible because you need months to do that. Then you've
19 got to take depositions. Then you've got to refresh
20 depositions.

21 THE COURT: So you can agree to a cutoff date. A
22 mutual cutoff date.

23 MR. MANGI: Well, that is what we did, Your Honor.
24 We agreed to a mutual cutoff date for production.

25 THE COURT: But your damages are continuing, how

1 can they not get discovery on that?

2 MR. MANGI: Because, Your Honor, the way that has
3 been dealt with in every case I've ever litigated with
4 continuing damages is that you agree on certain date for the
5 custodial stuff that's hard to do, and then at some point
6 close to trial, you update data. And that underlying data
7 both goes to your damages claim; it goes to any mitigation
8 claim. And all the damages, mitigation data that I've
9 described, they'll get.

10 So that's the practical accommodation.

11 THE COURT: What about the fact that they didn't
12 know about CAP until this summer?

13 MR. MANGI: So let's talk about that. I thought
14 you didn't care about that one, Your Honor. But that's what
15 I was going to address.

16 THE COURT: No. I care about it because Mr. Duva
17 told me to care about it.

18 MR. MANGI: Yeah, so let's -- let me go back and --
19 let me go back and address that one.

20 So here's -- here's the -- here's a remarkable
21 irony about this, Your Honor. The substantial cutoff date,
22 September 24th --

23 THE COURT: Right.

24 MR. MANGI: -- right? We produced our documents,
25 vast majority of them in June, months before we actually were

1 obligated to do that.

2 They have not met any of those deadlines that were
3 there, even when it comes to the September date, they made a
4 production, but we got big productions from them on Friday
5 and again today. So they're still turns out documents, and
6 we didn't get the bulk of their production until September.
7 So there are lots of things in their documents that we are
8 discovering for the first time now as we look at them.

9 THE COURT: What's the point of this conversation?

10 MR. MANGI: The point of this conversation,
11 Your Honor, is that the way you learn about the other side's
12 factual story is in two ways: One, you look at the
13 documents. When it comes to the documents, we produced them
14 months before they did. So they've got nothing to complain
15 about there.

16 Two, you serve interrogatories. And you ask for
17 information. They never served any interrogatory going to
18 any issue that we did not provide a clear and candid answer
19 to.

20 So everything here has proceeded exactly like it
21 would in any other case. Nothing has been hidden from them.
22 They've had all of the documents. They've had them before
23 they were due. And, in fact, they've had every document that
24 they have --

25 THE COURT: Except for the CAP information.

1 MR. MANGI: No, Your Honor. The CAP information is
2 part and parcel of everything we've produced to them. These
3 are documents that we've produced to them.

4 The documents that they are talking about the CAP
5 program based on now, those are all documents that we
6 produced to them.

7 So they've had had the benefit of have discovery.
8 They got it -- not late; months before they were required to
9 get it because we timely produced our documents and produced
10 them long before they did.

11 So nothing's been hidden from them.

12 So the point here, Your Honor, ultimately is, as I
13 sort of hear you thinking through this, I see there are two
14 potential pathways here. One is Your Honor takes the view
15 that, look, in anyway case, there's got to be someplace where
16 you stop with the email production; this goes on forever and
17 we never get to trial. If that is the view, we already
18 agreed on a cutoff. And we are giving them all this data
19 going forward.

20 On the other hand, if Your Honor feels like there
21 needs to be an update of underlying email issues -- right? --
22 then I would say, because what they're seeking from us is
23 tantamount to a wholesale update, they have to do a wholesale
24 update too. Otherwise, it's one way.

25 THE COURT: I agree with that. And I can't agree

1 with the cutoff date being September when they just found out
2 about CAP and they need information about that.

3 MR. MANGI: Okay. So if Your Honor --

4 THE COURT: So I'm suggesting is that, yes, both
5 sides have to do an update, that you sit down and decide what
6 the date for the cutoff exchange update damages accumulation,
7 because it's got to coincide with that. If you're going to
8 condition to allege accumulation of damages, they're entitled
9 to continue to allege failure to mitigate. No?

10 MR. MANGI: But, Your Honor -- I'm sorry.

11 But in that scenario, the prism you are looking at
12 this through, there's no way a case with ongoing damages can
13 ever get to trial because you have to keep updating your
14 documents. How do you get to deposition?

15 THE COURT: That's why I'm suggesting that both
16 sides come to terms with the date, a realistic date that
17 total production, that depositions are completed, and that
18 cut off the damages and the failure to mitigate. I am not --
19 I don't think that's unreasonable to expect the parties to
20 agree to a date like that.

21 If you continue to accumulate damages through the
22 day of trial, they're entitled to investigate mitigation
23 through the date of trial -- or failure to mitigate.

24 MR. MANGI: But, Your Honor, in that scenario,
25 let's say -- let's say just for purposes of argument --

1 THE COURT: This isn't a car accident.

2 MR. MANGI: Well, that's the point, though, with
3 Your Honor. That's why this is a problem -- because, you
4 know, let's say we incur -- I'm just making up a number here.
5 Let's say we incur \$20 million a month in damages. Okay? So
6 Your Honor is proposing that if damages have to match up
7 exactly with the date of document production -- right? -- --
8 so let's say we pick December of 2023 -- again with that I'm
9 just making this up. And we say, okay, we'll produce through
10 there, and we'll do -- and we'll do damages through there.

11 Okay. Then we've got to do depositions. We've got
12 to do expert work. We've got to get to trial. I know
13 there's still a significant backlog in this district from the
14 shortage. So, you know, maybe we don't get to trial until
15 the end of next year. So now we've had 12 months times \$20
16 million a month of damages which, under this prism, there's
17 no remedy for.

18 Your Honor, I have never -- I have never come
19 across a rule that says you cannot seek ongoing damages and
20 you have to cut off at the same date as document production.
21 That is -- respectfully, that is not a rule that I've
22 every --

23 THE COURT: It may not be a rule, but as I see it,
24 if you accumulate an alleged continuing damages --

25 MR. MANGI: Yes.

1 THE COURT: -- they have a right to continuing
2 investigation of failure to mitigate, and you're just going
3 to say at trial, okay, the last two months, we had \$50
4 million in damages. And they are going to say, okay. No
5 problem. We don't need to know about it.

6 MR. MANGI: No. That's not what we're --

7 THE COURT: We'll accept your number.

8 MR. MANGI: -- that's not what we are saying at
9 all, Your Honor.

10 What we are saying is, yeah, they can get update an
11 mitigation, but we can't be digging into emails continuously
12 for every stray mention. There has to be some middle ground
13 there where, okay, you can get this data, you can get this --
14 these benefits investigations, you can get some corpus of
15 materials that are critical to your mitigation argument on an
16 ongoing basis.

17 But to say that you must have every email through
18 to the date of trial in order to have an ongoing damages
19 claim, Your Honor, I've never heard --

20 THE COURT: I see.

21 MR. MANGI: -- any court anywhere in the country
22 take that position. And as a practical matter, it's
23 completely impossible.

24 What it does ultimately is it says to plaintiffs,
25 you know, for whatever that gap is between the end of

1 document production and trial, you know, I, the Court, am
2 going to require you to give up your damages. That is giving
3 them like a hundred million dollar gift. And it has -- it
4 has no basis, Your Honor, respectfully in any principle here.

5 The principle that I think is entirely fair is that
6 if we're seeking damages on an ongoing basis, yeah, if
7 there's data we have that goes to mitigation, they should be
8 able to get that too. Right? So they can have a reasonable
9 response to it. That part is fair. And I give you that.

10 But to say that we have to cut off our damages and
11 give up on the last year or so just so they can have every
12 email through that date, I don't think that the fair,
13 Your Honor. And I'll --

14 THE COURT: Okay. I understand better what you're
15 talking about now.

16 MR. MANGI: Okay.

17 THE COURT: I don't want to deal with that, though,
18 today.

19 MR. MANGI: Yeah. Okay.

20 THE COURT: But I do understand better what you're
21 talking about. And I don't think we're there yet.

22 MR. MANGI: Yeah, okay.

23 THE COURT: So let me punt on that, if you will.

24 MR. MANGI: Sure. Sure.

25 MR. ELSBERG: Your Honor, may I respond?

1 MR. MANGI: So --

2 THE COURT: What? Yeah, you can respond.

3 Do you want to know what Mr. Duva says? 26(e)(1)
4 duty to supplement discovery responses.

5 MR. ELSBERG: Your Honor.

6 MR. MANGI: I'm sorry. I didn't hear that.

7 MR. ELSBERG: If I may, Your Honor --

8 THE COURT: 26(e)(1), the duty to supplement
9 discovery responses.

10 MR. ELSBERG: Your Honor, if I may, I've heard a
11 lot. And if I may respond to what I've been hearing.

12 THE COURT: Okay. You can respond. But -- okay.
13 I have some questions, perhaps. Go ahead.

14 MR. ELSBERG: I'll be very quick.

15 So first of all, whatever counsel's -- whatever
16 counsel's experience has been, it's very, very different from
17 my experience. When there are ongoing damages, you pick
18 date, and you say I'm seeking damages through this date, and
19 you give discovery through that date because while he says it
20 would be a hundred million dollar gift, if they could avoid
21 damages, if they could avoid proving damages, it would be a
22 hundred million dollar theft from us if we aren't able to
23 disprove it.

24 So what parties do is they pick a date, and both
25 parties produce. And we're both capable law firms. If we

1 need to be producing while the trial is even happening, can
2 you do it.

3 And, by the way, this is not a problem of do we
4 have to wait forever to have a trial? No, of course, you
5 don't.

6 There'll be this trial, and there will be a
7 verdict.

8 And after that, if they think that they have a
9 claim for damages that were not the subject of this trial,
10 well, maybe they can try and sue again. I think probably the
11 outcome of that this trial is going to make the rules of the
12 road very, very clear, and there's never going to meet --
13 there will never be a need for another trial.

14 But that's how it works. You pick a point. And,
15 of course, discovery -- so each side can test the other's
16 assertions.

17 The second thing is I just want to point out that
18 what we heard about what they're saying they have and they'll
19 give us, why that -- he just underscored why it is we need
20 the search terms that we proposed, why it is we need them to
21 be run -- because I didn't realize until just now listening
22 that the data, the summaries that they say they'll give us
23 are market-aggregated data. There are these services out
24 there, and they do whatever they do this their proprietary
25 way. We don't know how they do it. And they aggregate some

1 data to give to the market.

2 Their mission, their mandate is not to find the
3 evidence we need about SaveOn patients and J&J's knowledge
4 that they were SaveOn patients. And I will guarantee and
5 they will not tell you the contrary, these market
6 aggregators, they do not have the emails, they do not have
7 the types of documents that we've seen that demonstrate that
8 they knew that patients were on SaveOn. So they're pointing
9 to something over there that does not include these emails,
10 these specific documents -- they're saying go to some vendor
11 who wasn't even -- it wasn't their job to do this, and
12 whatever their job was, they didn't find these documents.

13 CAP A, CAP M, and adjustment program will.

14 And, by the way, Your Honor, when you hear counsel
15 say we shouldn't have to search for every email, that is a
16 suggestion and a burden argument. Their burden argument is
17 completely hollow, and I'll tell you why.

18 THE COURT: You don't have to. I am not
19 considering a burden.

20 MR. ELSBERG: Okay. All right, Your Honor.

21 THE COURT: I didn't understand you to argue burden
22 insofar as -- I didn't understand that to be the focus of
23 your objection with respect to production.

24 MR. MANGI: Yeah.

25 THE COURT: What I understood -- and I just want to

1 be clear on this is --

2 MR. MANGI: Yeah.

3 THE COURT: -- these vendors have underlying data.

4 And you don't have access to that underlying data.

5 MR. MANGI: There are -- there are two sets of data
6 that we're talking about, Your Honor. I just wanted to make
7 sure this is entirely clear.

8 THE COURT: Yeah.

9 MR. MANGI: Right? There is data that is our data
10 about the CarePath program. Right?

11 THE COURT: Yes, you're going to produce that.

12 MR. MANGI: The vendors --

13 THE COURT: Yes.

14 MR. MANGI: -- they use some of that also, but that
15 data we're producing to them. Okay?

16 THE COURT: Okay.

17 MR. MANGI: So that data they have. Whether we're
18 using it, the vendor is using it, they've got that data.

19 And then whatever other --

20 THE COURT: So, well, that's interesting.

21 MR. MANGI: And then whatever other data is out
22 there in the market, you know, that's -- that is data
23 analyses that vendors have that they can do.

24 But they've got all of the data relating to
25 CarePath, which we maintain -- right? -- we're giving them

1 that data, that claims data. And we're proposing to update
2 the in the future.

3 MR. ELSBERG: Your Honor, they're not. They're
4 not. They say we're giving you the data. They're saying
5 that. They're mouthing the words: We are giving you the
6 data.

7 But they're not because the way to find the data
8 that matters here is run the search terms that are most
9 likely to get --

10 THE COURT: I didn't get there yet. You're talking
11 about CAP A, CAP M?

12 MR. ELSBERG: Yes, Your Honor.

13 MR. MANGI: Yes.

14 THE COURT: I'm going to order that they search
15 CAP A and CAP M and adjustment programs but related to
16 SaveOn.

17 MR. ELSBERG: May I speak about that for a moment,
18 Your Honor?

19 THE COURT: Okay.

20 MR. ELSBERG: So documents that mention maximizers
21 and accumulators do relate to SaveOn. And the reason is they
22 say that SaveOn is a maximizer or an accumulator.

23 And one of the documents in the hand-up that I gave
24 you --

25 THE COURT: So what about searching maximizer,

1 SaveOn?

2 MR. ELSBERG: Yes, Your Honor. If they are "or"
3 connectors, yes.

4 MR. MANGI: Well --

5 MR. ELSBERG: Hold on. Hold on.

6 MR. MANGI: Right.

7 MR. ELSBERG: Before you guffaw in response, the
8 reason it should be "or" -- the reason it should be "or" --

9 THE COURT: You're going to say they deny being a
10 maximizer.

11 MR. MANGI: No, no, no. I'm going to say something
12 entirely different, which is he just slipped in make it an
13 "or" connector. That means he wants all documents that are
14 maximizers generally, including maximizers, other ones --

15 THE COURT: I wanted the qualifier SaveOn.

16 MR. MANGI: Yeah, but he slipped in a connector
17 "or," which means either -- in it's about SaveOn, they get
18 it. If it's not about SaveOn, they get it too.

19 THE COURT: All right. Now we're out of control.
20 Tell me what you want.

21 MR. ELSBERG: Yeah. So what we want is not every
22 document that says "maximizer" --

23 THE COURT: Tell me precise what you want.

24 MR. ELSBERG: We want -- we within the to search
25 for CAP A, CAP A, and adjustment program and I believe the

1 suggestion was to add a limiter to those search terms, so it
2 would say "and maximizer," and we think that makes sense.

3 THE COURT: Related to SaveOn. Qualified by
4 SaveOn.

5 MR. ELSBERG: No, no. Here's why not, Your Honor.
6 Here's why not.

7 If Your Honor looks at Hand-up 1, Row E. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 And to not be able to use documents that show
17 here's what they were doing with maximizers, that would be
18 like saying they have a policy with respect to fruit, all
19 fruits, but you can't look for what rules he had with respect
20 to fruit. You can only for what they did to apples.

21 The problem is maximizer includes SaveOn. So if
22 you cut out maximizers, you're cutting out what they said
23 about --

24 THE COURT: [REDACTED]

25 MR. ELSBERG: [REDACTED]

1

2

THE COURT: Right.

3

MR. ELSBERG: As used respect to maximizers.

4

THE COURT: What are we doing?

5

MR. MANGI: So, I mean, the problem --

6

THE COURT: Yeah, go ahead.

7

8 MR. MANGI: Yeah, the problem -- here's what he's
9 saying, Your Honor. He's saying when we talk about
10 maximizers, you know, that might include SaveOn in it.
11 Right?

12 And, yeah, that's true. It might also include two
13 dozen other companies that have nothing to do with SaveOn.

13

THE COURT: I agree with that point.

14

MR. MANGI: Okay.

15

16 THE COURT: I'm trying to get where we bring in
17 that which is --

17

MR. MANGI: Yeah.

18

THE COURT: -- identifiable with SaveOn.

19

MR. MANGI: Right.

20

21 THE COURT: And if it applies to express scripts or
22 Accredo, why does that certain you?

22

MR. DUNLAP: Your Honor, may I make a suggestion?

23

THE COURT: Yeah.

24

25 MR. DUNLAP: I think one of the issues here is we
are fumbling a little bit in the dark because we don't have

1 hit counts.

2 So if what -- if they could just take the terms
3 that we have proposed, the CAP M, the CAP A.

4 MR. MANGI: We're not talking about hit counts.
5 We're not talking about burdens.

6 We're talking about -- I'm sorry. Go ahead.

7 MR. DUNLAP: I mean, if they -- if we could get an
8 order that they at least have to run those hit counts, you
9 asked us to meet and confer, then we would know of how many
10 documents we're talking about. Run the terms that we've
11 asked over the limited time period we've asked, and then they
12 can talk about whether it's really too burdensome to do all
13 the collections. But we're not actually --

14 THE COURT: It's not burden that concerns me. It's
15 unnecessary conducting of search terms that are not limited.

16 MR. DUNLAP: And as Mr. Elsborg was saying, for
17 example, we've seen instances within Johnson & Johnson's
18 documents when they're talking about SaveOn, they don't
19 always use the word "SaveOn" or "SOSP."

20 They'll say, for example, "ESI's maximizer" or
21 "maximizer programs." But if they could identify someone on
22 maximizer, then they could identify someone who's on the
23 SaveOn program as being on a maximizer.

24 MR. MANGI: Your Honor, there's -- I'm sorry. Go
25 ahead.

1 MR. DUNLAP: So, I mean, to put to say we're going
2 to limit it just to the word "SaveOn" or acronyms for SaveOn,
3 would cut out a whole number of documents potentially where
4 they're referring to SaveOn by another name or they're
5 referring to other maximizer programs. And that's our
6 concern.

7 MR. MANGI: Your Honor, there is no search protocol
8 in this universe that is perfect that's going to capture
9 every document, that's going to look into people's minds.
10 Right? We have to be practical and, under the federal rules,
11 proportional.

12 THE COURT: [REDACTED]

13 MR. MANGI: [REDACTED]

14 [REDACTED]

15 THE COURT: Okay.

16 MR. MANGI: The way you modify that --

17 THE COURT: Yeah.

18 MR. MANGI: -- to capture the -- about SaveOn is
19 you add an additional requirement -- for example, you said,
20 instead of they're searching CAP M in the abstract, you say,
21 CAP M within the same sentence as SaveOn or variants on
22 SaveOn, like SOSPO or whatever it may be.

23 And then you'll get the documents that are talking
24 about CAP M but also about SaveOn, and those hits appear in
25 the same sentence.

1 MR. ELSBERG: Your Honor, if I --

2 MR. MANGI: Or --

3 MR. ELSBERG: We may be close to a --

4 MR. MANGI: Sorry, can I just finish what I'm
5 saying.

6 So you then have a modifier that limits it to the
7 SaveOn context; right? And that is the way to accomplish
8 what Your Honor is seeking.

9 THE COURT: Okay.

10 MR. MANGI: However, in terms of your question as
11 to where are we and where do we take this -- right? -- my
12 suggestion -- I understand you want to -- you don't want to
13 deal with the issue of when do we update until right now; so
14 I'll set that aside.

15 But I will say, we're going to do an update of CAP
16 A, CAP M terms, modified to be limited to SaveOn, is
17 basically everything we have tantamount to a full update on
18 SaveOn to the present, I want the same from them.

19 THE COURT: What was the agreement you suspect we
20 might have arrive at?

21 MR. ELSBERG: Yeah, so this is what I'm thinking,
22 Your Honor. We could -- we could agree to do what counsel
23 just said except instead of saying within the same sentence,
24 I think it's fair to say SaveOn and variations on it, if it's
25 in the same document, we should get the document, because

1 it's talking about SaveOn. It doesn't need to be in the
2 sentence. It could be three paragraphs later. It could be
3 the next page.

4 THE COURT: Okay. That's an agreement. You've
5 just agreed to that.

6 MR. ELSBERG: And, Your Honor, I would then say I
7 hope that's going to be sufficient. And --

8 THE COURT: Well, I don't want to talk about
9 what-ifs or tomorrow.

10 MR. ELSBERG: Fine.

11 THE COURT: And let's not get hyperbolic about
12 anything in terms of what that's going to uncover and produce
13 because the points that's really being paid here is there's
14 going to be a stop at some point. There is got to be.

15 So let's just minimize -- minimize -- let's do the
16 search that was suggested if CAP M and CAP A.

17 MR. ELSBERG: And adjustment program.

18 THE COURT: And adjustment programs.

19 MR. ELSBERG: With variations of SaveOn in the
20 document.

21 THE COURT: And that's an agreement. Right? Yes.
22 Okay. Good.

23 MR. ELSBERG: All right. Thank you, Your Honor.

24 MR. MANGI: Don't be thanking just yet. Just to
25 get -- just to get the other side of it, though, Your Honor

1 they're going to update their searching through to the
2 present as well.

3 THE COURT: Yes.

4 MR. MANGI: Okay.

5 THE COURT: You're going to update your searches to
6 the present as well.

7 MR. MANGI: And then, Your Honor, the one issue
8 that that leaves is what I don't --

9 THE COURT: There's another issue.

10 MR. MANGI: Your Honor, it's tied to this.

11 The only thing I don't want to happen here,
12 Your Honor --

13 THE COURT: Is --

14 MR. MANGI: -- is for this case then -- for them to
15 come back then and say, well, sorry, we can't take any
16 depositions. We've got to push the whole case off six
17 months.

18 THE COURT: That may happen. I can't do the
19 what-ifs. How do I know what's going to be produced in these
20 emails? How do you know?

21 MR. MANGI: No that. I'm with you. But I'm
22 getting there.

23 So the one thing I would ask is that Your Honor
24 require both sides to do this work expeditiously, collect the
25 documents, run the searches, prepare a plan for completing

1 | this in a time will expedited way, bearing in mind the
2 | current case schedules, and then to report back to you on
3 | where that stands -- because I am very concerned, Your Honor,
4 | there are a lot of patients impacted. There's lot of our
5 | money going out the door every day. And the schedule is a
6 | big concern with our clients.

7 | THE COURT: They're J&J.

8 | MR. MANGI: Yeah, but, Your Honor, you know, it's
9 | true. J&J does have -- you know, is not in the poorhouse.
10 | I'll give you that.

11 | But -- but there is a very real impact on patients
12 | of this program. And that motivated us in large part in
13 | bringing this case, and that's going on every day.

14 | THE COURT: All right. So when you end up in
15 | mediation and settle the case, you just have to get to point
16 | where it's -- because I'm going to order you to mediation at
17 | some point. I have to feel as if everything's been done --

18 | (Simultaneous conversation)

19 | (Simultaneous conversation)

20 | (Simultaneous conversation)

21 | MR. MANGI: I just had a thought, though --

22 | MR. ELSBERG: Your Honor, if I may -- if I may,
23 | Your Honor --

24 | (Simultaneous conversation)

25 | MR. MANGI: Sorry, can I just finish?

1 (Simultaneous conversation)

2 MR. ELSBERG: I just want to clarify something.

3 THE COURT: What?

4 MR. ELSBERG: So what we heard, I think, is counsel
5 saying we should have to update our documents also.

6 THE COURT: Yes.

7 MR. ELSBERG: I assume that what that means is we
8 need to update our documents that relate to this same issue.

9 MR. MANGI: No.

10 MR. ELSBERG: So -- all right. I want to be clear.
11 So you're saying that both sides should update all documents
12 responsive to all requests. Is that what you're saying?

13 THE COURT: Always. Why wouldn't that be the
14 nature course of things?

15 MR. ELSBERG: This is --

16 THE COURT: Discovery's not closed.

17 MR. ELSBERG: This is what I'm --

18 THE COURT: There's an obligation to continue to
19 supplement --

20 (Simultaneous conversation)

21 MR. ELSBERG: This is what I propose, Your Honor.
22 I would propose that for today, it makes sense to say that
23 they will update their documents, as we've already described.

24 We will update our documents on what they say is us
25 engaging in, quote, deceitful conduct to make it hard for

1 | them to know who's on SaveOn. And then -- and then --
2 | because those are two sides of the same coin. And then I
3 | would suggest that the parties meet and confer about whether
4 | both sides --

5 | THE COURT: In my classroom in person.

6 | MR. ELSBERG: Yes, Your Honor.

7 | THE COURT: I am not going to have emails. I am
8 | not going to have telephone. I am not going to have Zoom of
9 | Teams.

10 | MR. ELSBERG: Yes.

11 | THE COURT: No.

12 | MR. ELSBERG: So what I would suggest is for today,
13 | that's the order. We get the documents that Your Honor
14 | described, which are targeted towards CAP. We agree we'll
15 | update our production of their, quote, deceitful-related
16 | requests. Those are requests that they --

17 | THE COURT: I don't even know what that is.

18 | MR. ELSBERG: I'll tell you.

19 | MR. MANGI: Your Honor --

20 | (Simultaneous conversation)

21 | (Simultaneous conversation)

22 | MR. MANGI: This had trying turn the whole ruling
23 | on its head --

24 | (Simultaneous conversation)

25 | MR. ELSBERG: Please let me -- please let me

1 finish.

2 Those are documents that are the other side of the
3 same coin.

4

5

6 They say they had trouble identifying patients
7 because SaveOn supposedly engaged in deceit. So.

8 So these are two sides of the same coin. Did they
9 and could they identify patients?

10 THE COURT: What updates do you want?

11 MR. ELSBERG: I suspect -- may I? I suspect that
12 if the parties have a chance to meet and confer, if that's
13 what's ordered today, I suspect that Johnson & Johnson does
14 not really feel a need for us to update everything. And I
15 suspect they don't want to update everything.

16 If we meet and confer and they say they do, but in
17 their letter, they didn't say that.

18 I think the parties may both be okay with updating
19 some but not others.

20 If counsel does not want to confer on that, that's
21 okay. I just think it might save some time and money if we
22 do the narrow thing now, which goes to the CAP program and
23 what they say are efforts we made to cause difficulty for
24 them to use the CAP program. Let's get that order today
25 because we don't want delay, as counsel said, and we can have

1 a week to discuss what else should be updated.

2 MR. MANGI: Your Honor, here's -- here's what
3 counsel is proposing to you. He's suggesting that J&J that
4 to look through potentially hundreds of thousands of emails,
5 and they have to look at something that they're going to
6 self-define -- mean very little at all --

7 (Simultaneous conversation)

8 THE COURT: No. What I'm saying is both sides have
9 a continuing obligation to supplement and update discovery.
10 That's what I'm saying. And that's what you're saying. And
11 that's what you're saying.

12 I am not limiting any supplementation. There's no
13 limitation. If there's new discovery or developing
14 discovery -- and I suspect during depositions there'll be a
15 load of additional discovery, you have an obligation -- why
16 are we having this conversation?

17 MALE SPEAKER: Understood, Your Honor. Thank you.
18 124 because, Your Honor, the reason -- the reason we're
19 having the conversation is because, yes, of course, you
20 supplement. In the course of -- in depositions documents
21 come up, what about this? What about that?

22 But in every case, there is a cutoff when you go
23 and collect the documents --

24 THE COURT: We're not having a cutoff discussion.
25 We're not doing that.

1 We are not even near that. We just opened CAP can
2 of worms.

3 MR. MANGI: Yeah.

4 THE COURT: How with we going to possibly put
5 cutoff date when we don't even know what that production
6 looks like.

7 MR. MANGI: Yeah, so then -- so then, my point,
8 Your Honor, is if they want the update on all these --
9 whatever mitigation steps, as they're describing it that we
10 have done to present -- right? -- we want to understand
11 everything about how the scheme has evolved and changed over
12 time, which is all their business model has been doing over
13 the last year.

14 So we don't want just what they're describing as
15 their "deceit production," whatever that means. Right? If
16 we're going to do this, I want them to just bring their
17 document production up to date with the search terms we
18 already have.

19 THE COURT: I've already said that all productions
20 will be updated and supplemented. That's all I'm going to
21 say.

22 If there are going to be complaints about it after
23 you have meet-and-confers in my courtroom, then I guess I'll
24 have to deal with it, if I can, or a special master will.

25 MR. ELSBERG: And, Your Honor, I think -- I

1 think --

2 THE COURT: I still have something else to discuss.

3 MR. ELSBERG: One sentence. Really one sentence.

4 I think what you're saying is a practical reality.

5 What I predict is that the parties will end up speaking, and

6 I predicted neither side is really going to want to update

7 everything. And there might be agreements that carve some

8 things out. And if not, then --

9 THE COURT: Well, then you'll be back here, and I
10 have more weekend work to do. And I'll be very unhappy about
11 it.

12 MR. ELSBERG: Oh, no. I was saying I think the
13 parties might agree.

14 THE COURT: You might try to agree on something.

15 MR. ELSBERG: Yes.

16 THE COURT: Because -- I had to knock off any
17 afternoon calendar for this.

18 MR. ELSBERG: Yes, Your Honor.

19 Thank you. We understand the ruling.

20 THE COURT: Here's the other thing. The
21 custodians, which we glossed over, are they apex? Is -- do
22 you need to further discuss them? I'm going to permit
23 additional custodians. I know we're down to six. But are
24 you alleging they're apex?

25 MR. MANGI: So, Your Honor, my colleague

1 Mr. LoBiondo will address custodians.

2 THE COURT: Oh, my god.

3 MR. MANGI: But, okay. I'll answer your question.

4 There are -- there are two of them in there who are
5 amongst the most senior executives.

6 THE COURT: I saw that.

7 MR. MANGI: Yeah. And -- and let me point out
8 also, Your Honor, that every custodian who we add, you know,
9 potentially thousands and thousands of documents to go
10 through to get to whether anything is even responsive.

11 THE COURT: Good. It's good. Then you have a job
12 then.

13 MR. MANGI: Well, we've got job security in this
14 case already, Your Honor. Because we --

15 THE COURT: That's my fear.

16 MR. MANGI: We still have to go through the --
17 thousand documents they produced on Friday.

18 THE COURT: That's my biggest fear.

19 MR. MANGI: But -- but the point is, Your Honor --
20 look, if you decide ultimately there's some custodial
21 discovery --

22 THE COURT: Yes.

23 MR. MANGI: -- that they should get, you know,
24 understood.

25 But --

1 THE COURT: Start with the four that are nonapex
2 out of six. And then we can discuss the apex -- alleged
3 apex's status.

4 MR. MANGI: Okay.

5 MS. NELSON: Can I address, briefly, Your Honor?

6 THE COURT: Yeah, okay.

7 MS. NELSON: And not to cut off Mr. Mangi off, but
8 I think we're moving on --

9 THE COURT: No, he's going to -- he's going to live
10 right there.

11 MS. NELSON: That's mine. He can stay there.

12 MR. MANGI: I like it here.

13 MS. NELSON: I just want to be very clear,
14 Your Honor. We cited cases in our letter. The apex
15 doctrine, black-letter law, it does not apply to document
16 discovery. Right? The purpose of the apex doctrine is to
17 shield high-level executives from being forced to testify,
18 because that takes time out of their lives. It takes time
19 out of their days. That is the purpose. It's about
20 testimony.

21 It does not apply, clear law, it does apply to
22 document discovery.

23 THE COURT: So you're not alleging --

24 (Simultaneous conversation)

25 THE COURT: -- if it doesn't apply.

1 MS. NELSON: It does not put any burden opinion
2 executives to have their documents collected. It just
3 doesn't. So I don't think that's an issue that we should be
4 debating here. I think the law's very clear.

5 MR. MANGI: Identify in the same way, but
6 nonetheless, when you're talking about at that executives of
7 the company, whether you need to go and wade through all of
8 their documents -- them for the purposes of collection,
9 expose all of their very sensitive documents to these guys,
10 yeah, I would suggest that when you're dealing with a top
11 executive, there needs to be just a little bit more
12 circumspection and need shown, which they have not done for
13 any of those people.

14 So if Your Honor's point is, look, when it comes to
15 the number they wanted, you know, we think we should
16 compromise and do four, okay.

17 THE COURT: I said start with four.

18 MR. MANGI: We'll talk to them about it. Fine.

19 THE COURT: And then we can discuss the two that
20 you're going to try and protect with the apex doctrine, which
21 is, according to adversary inapplicable to documents.

22 MR. MANGI: Yeah.

23 THE COURT: I just assume ultimately you're going
24 to want to depose him anyway, but maybe not.

25 MR. MANGI: Yeah, my one -- the only -- we'll do

1 that, Your Honor. Understood. Have the one point I just
2 want to flag, though, Your Honor, you know, is every time we
3 add a custodian -- right? -- that is adding significant more
4 time to the case, and we're doing this, you know, now a month
5 after the substantial close of production.

6 So I'm very concerned and my client is very
7 concerned about this case being pushed off into eternity
8 which makes them 10 times as much money every month as they
9 spend on litigation.

10 THE COURT: It won't get pushed off until it --
11 until eternity. I'm doing the best I can.

12 MR. MANGI: No, no. I hear you, Your Honor. I
13 just want to --

14 THE COURT: So you have to -- when you have to
15 spend the weekend and Mr. Duva has to spend a week or two
16 evaluating close to a hundred pages of letters --

17 MR. MANGI: Yeah.

18 Your Honor --

19 THE COURT: You tell me who's putting the case off.

20 MR. MANGI: No, no, well, but, Your Honor, I would
21 like to point out one fact about that. You will note that of
22 the six applications that are here before you today, there is
23 not one, not one made by us. We made all our motions --

24 THE COURT: That's true.

25 MR. MANGI: -- months ago. And you'll remember --

1 THE COURT: But if you just say "yes" to
2 everything, then we wouldn't be here.

3 MR. MANGI: Yes. But you'll remember, Your Honor,
4 that every application we had was discrete, was focused, and
5 was made on time.

6 THE COURT: I do remember that.

7 MR. MANGI: Okay. So I certainly -- you know, I
8 understand the frustration with the current load. But I did
9 want to point that out.

10 THE COURT: Okay. I wouldn't call it frustration.
11 I'd call it anger.

12 MR. MANGI: Yeah, and -- justified.

13 THE COURT: You know how nice it was Saturday?

14 MR. MANGI: Going through this stuff?

15 THE COURT: The weather.

16 MR. MANGI: Oh, the weather.

17 THE COURT: Do you know? Because I don't.

18 MR. MANGI: Your Honor, actually, I don't either.
19 I'm sorry to say.

20 THE COURT: Take us off the record.

21 Thanks.

22 (Conclusion of proceedings)

23

24

25

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 122 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

2nd of November, 2023

Signature of Approved Transcriber

Date

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